Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement

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Eyewitness testimony is among the most damning of all evidence that can be used in a court of law. When an eyewitness points a finger at a defendant and says, “He did it! I saw him. I was so shocked I’ll never forget that face!” the case is as good as over. “Cast-iron, brass-bound, copper-riveted, and airtight,” as one prosecutor put it. The defendant sits helpless, without hope, eyes wide, fear turning into panic. Only someone who has been falsely accused of a crime he didn’t commit can know just how devastating the experience can be. I once heard a falsely accused person say, “I’d rather have terminal cancer than go through this.”

I. INTRODUCTION

Consider the following cases.2

In May 1984, a Cook County, Illinois jury convicted Ronnie Bullock of aggravated sexual assault in the kidnapping and rape of a nine-year-old girl. The evidence against him included identification of him in a police line-up by two different victims. Bullock was sentenced to sixty years in prison.

On March 24, 1987, Leonard Callace was sentenced by a Suffolk County, New York judge to twenty to fifty years in prison for the kidnapping and rape of a teenage girl. The prosecution’s case included the victim’s identification of Callace from a photo array and also in court.

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* Professor of Law, University of Arkansas School of Law; J.D., University of Maryland School of Law; Ph.D., University of Tulsa.

1. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY v-vi (1996 ed.).
2. Each of these examples is taken from EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL CH. IV (June 1996) [hereinafter “DNA Case Studies”] (sponsored by United States Department of Justice, Office of Justice Programs), available at <http://www.ncjrs.org/txtfiles/dnaevid.txt>. 
Terry Leon Chalmers was sentenced by a Westchester County, New Jersey court on June 9, 1987 to twelve to twenty-four years in prison for rape, sodomy, robbery, and grand larceny. The victim identified Chalmers from a police photo array, in two separate police line-ups, and in court.

On two separate occasions in July 1984, a man broke into an apartment, cut the telephone wires, sexually assaulted a woman, and stole property. The prosecution’s case against Ronald Cotton for one of the rapes included photo and police line-up identification by one of the victims. His conviction was overturned on appeal, in part because the trial court did not allow evidence that the second victim had identified another man in a line-up to go to the jury. Cotton was then retried for both rapes, after the second victim decided that he was her assailant. He was convicted in November 1987 of both rapes and sentenced to life in prison.

In January 1984, a young woman was forcibly abducted by two men while walking from a San Diego, California drugstore to her car. She was raped and robbed. The victim made a photo identification of Frederick Rene Daye and both the victim and another witness identified Daye out of a police line-up. Daye was convicted and sentenced to life in prison on the kidnaping charge and fourteen years, eight months on the other counts.

In October 1987, William O’Dell Harris was sentenced to ten to twenty years in prison for the sexual assault of a nurse who was attacked while walking home from work. A sheriff’s deputy testified at Harris’s trial that the victim, who stated that she was acquainted with Harris, had identified him as her assailant. The victim also identified Harris in a police line-up and in court.

These cases have several features in common. Each involved a horrible crime. In each case, an important component of the prosecution’s case was eyewitness identification of the defendant as the perpetrator. In each case the defendant was convicted and sentenced to a lengthy prison term. And, in each case, subsequent DNA tests demonstrating that the defendant could not have been the perpetrator eventually resulted in his release. Bullock, Cotton, and Daye served ten years of their sentences, Chalmers served eight years of his sentence, Harris served seven years, and Callace served almost six.
These cases share another feature: they are not alone. They, and others like them, have contributed to a growing awareness that there is a real risk in the American criminal justice system of the conviction and sentencing of individuals for crimes they did not commit. This risk has received special attention in capital cases, where there is mounting evidence that people are being sentenced to die, and perhaps actually being executed, for crimes of which they are in fact innocent. For example, a staff report of the House Judiciary Committee concluded that, "there is a real danger of innocent people being executed in the United States."
There is reason to believe that recurring factors contribute to erroneous convictions and that among them is mistaken eyewitness identification. According to one review, "numerous analyses over several decades have consistently shown that mistaken eyewitness identification is the single largest source of wrongful convictions." There are also reasons to suspect that the error-avoidance and -correction mechanisms usually relied on by the law—prosecutorial discretion, cross-examination by counsel, evidentiary rulings by judges, jury decision-making, and appellate review—are less than adequate to remedy the problem.

Everyone—well, almost everyone—loses when someone is falsely convicted. The innocent defendants obviously suffer a grievous injustice. Some may never obtain release from their sentence and few are actually, much less adequately, compensated that would halt executions, but strong public support for capital punishment has contributed to the measures' defeat in each case. The Nebraska legislature did enact moratorium legislation, but Governor Mike Johanns vetoed the measure. Robert Tanner, Illinois Gives Death Penalty Critics Hope, AP ONLINE, Jan. 31, 2000, available in Westlaw ALLNEWS at 1/31/00 ASSOCPR or at 2000 WL 12386570.

5. DNA Case Studies, supra note 2, at 17 (commentary of Neufeld and Scheck: "the problem of wrongful convictions in America is systemic and serious"). Another contributing factor is inadequate provision for defense counsel. This problem is especially acute in death penalty cases. See infra note 205.

6. Gary L. Wells & Eric P. Seelau, Eyewitness Identification: Psychological Research and Legal Policy on Lineups, 1 PSYCHOL., PUB. POL'Y, & L. 765, 765 (1995). See also C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONViction AND PUBLIC POLICY 66 (1996) (concluding that "the single most important factor leading to wrongful conviction in the United States and England... is eyewitness misidentification, to which we could add, in good faith."). Although some researchers have estimated that eyewitness identification plays a prominent role in only a small proportion of the cases that actually go to trial, an archival study of actual police records found that "eyewitness identification is important in the investigatory phase of a case if not in the cases that actually come to trial." Patricia A. Tollesrup et al., Actual Victims and Witnesses to Robbery and Fraud: An Archival Analysis, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 144, 152 (David F. Ross et al., eds., 1994) (citing V.J. Konecni & E.B. Ebbesen, Courtroom Testimony by Psychologists on Eyewitness Identification Issues: Critical Notes and Reflections, 10 LAW & HUM. BEHAV. 117-26 (1986)). Further, simulation studies indicate that eyewitness testimony is heavily influential in jury decision making. LOFTUS, supra note 1, at 8-19. In any event, the 1996 analysis of Huff and colleagues—which assessed "more than 500 acknowledged false positives (with more called to our attention each month)," conducted a survey of participants in the Ohio criminal justice system (attorneys, judges, law enforcement officials), and reviewed other studies—concluded that eyewitness error is "by far the most frequent type of error leading to false conviction." HUFF, supra, at 66.

7. See infra Part IV.A.
The interests of neither the victim in particular nor society in general are properly served by erroneous convictions: the objectives of retribution, deterrence, and incapacitation are not advanced by punishing and restraining the wrong person. Such errors can erode public trust in and respect for the criminal justice system. And the mistaken eyewitness may eventually experience profound distress over having played an instrumental, even if unwitting, role in a grave miscarriage of justice. The only winner when someone is falsely convicted is the actual perpetrator of the crime. As Elizabeth Loftus, one of the leading researchers on eyewitness evidence, put it, "When someone is accused of a crime he did not commit, two people are trapped on the dark side of justice, while the real perpetrator remains free." These points—the risk and consequences of mistaken eyewitness identification and the limited error-avoidance and -correction capacity of criminal litigation—combine to underscore the need for law enforcement officials to be especially careful to get it right the first time, at the investigation stage of the proceeding. If properly used, advances in the physical sci-

8. See, e.g., Michael Higgins, Tough Luck for the Innocent Man: As Scientific Breakthroughs Help Overturn More Convictions of Wrongly Imprisoned People, the New Crime is How Little Their Lost Lives Are Worth, 85 A.B.A. J. 46, 46-47 (Mar. 1999) (noting that, while a handful of wrongly convicted individuals may recover damages in a civil rights lawsuit or through special legislation, "the majority either get nothing or scrape and claw for merely a token sum from state compensation systems."). For a proposal to provide a legislative remedy for wrongful conviction that provides adequate compensation and avoids the limitations of current statutory remedies (such as pardon requirements, severe limitations on damages, and "clean hands" requirements), see Adele Bernhard, When Justice Fails: Indemnification for Unjust Conviction, 6 U. CHI. L. SCH. ROUNDTABLE 73, 100-10 (1999).

9. These observations assume that the practical objectives of retribution, deterrence, and incapacitation are the actual goals of the criminal justice system. To serve any of those goals, however, the system must display some minimal level of accuracy. Retribution assumes an underlying commitment to justice that is compromised when the innocent are punished; and deterrence is obviously undermined and restraint frustrated when the wrong person is punished and the guilty escapes. At some point, society's continued failure to address identifiable and remediable systemic sources of error—i.e., society's toleration of arbitrariness—will call into question whether retribution, deterrence, and incapacitation are in fact the real goals of the system. See Donald P. Judges, Scared to Death: Capital Punishment as Authoritarian Terror Management, 33 U.C. DAVIS L. REV. ___ (2000) (arguing that the arbitrariness, excessiveness, discrimination, and dehumanization that characterize American capital punishment indicate that the practice serves symbolic rather than practical objectives).

10. LOFTUS, supra note 1, at x.
ences, such as DNA typing, have—in the limited number of cases in which a sufficient uncontaminated biological trace is available for analysis—greatly enhanced investigators’ ability to rule out the innocent and sometimes to identify the guilty. Less widely recognized and implemented, but nevertheless important, are developments in social science research that can help to highlight and reduce likely sources of error in eyewitness identification. Law enforcement’s capacity to take advantage of those developments will depend on its willingness to be a rational and informed consumer of research results, which is not always easy in the polarized, adversarial environment of the criminal justice system and when scientific findings contradict commonsense or intuitive understandings of how memory works and call into question long-standing practices.¹¹

A noteworthy step toward integrating psychological research findings into the criminal investigation process is the Department of Justice’s effort to generate guidelines for developing procedures for handling eyewitness evidence. That project was prompted by recognition both of the risk of mistaken eyewitness identification, driven home by anecdotes like those recounted above, and of the potential usefulness for reducing the risk of error of a growing body of psychological research in this area. As the result of this initiative, the Department of Justice’s National Institute of Justice recently published its research report, Eyewitness Evidence: A Guide for Law Enforcement (“Guide”).¹² The Guide reflects the efforts of the Technical Working Group for Eyewitness Evidence (“Working Group”), a multidisciplinary ensemble of thirty-four individuals that included law enforcement officials, prosecutors, defense attorneys, and researchers from the United States and Canada.¹³ The “primary purpose” of the project was to recommend “best practices and procedures . . . in investigations involving eyewitnesses;” and its

¹¹. For description, from an insider’s perspective, of the process that yielded the Guide, see Gary L. Wells, et al., From the Lab to the Police Station: A Successful Application of Eyewitness Research, 55 AMER. PSYCHOL. (forthcoming June 2000) (manuscript on file with author) [hereinafter Successful Application]; see also infra note 12.


¹³. GUIDE, supra note 12, at 5.
point of departure was recognition that "eyewitness evidence, in
general, can be improved and made more reliable through the
application of currently accepted scientific principles and prac-
tices." The Guide offers recommendations regarding proce-
dures for interviewing eyewitnesses and for eyewitness identifi-
cation.

There is much to applaud in Justice's project. Most gener-
ally, although legal commentators for almost half a century have
been calling for law enforcement to adopt detailed guidelines to
reduce the risk of mistaken identifications and have offered
model "checklists," and although the "scientific study of eye-
ewitness testimony has been one of the most successful applied
research topics in scientific psychology over the last two dec-
ades," law enforcement has had difficulty developing a set of
workable, consistent, enforceable, and empirically based guide-
lines that address the primary sources of error. The Guide is a
formal attempt by the nation's highest law enforcement agency
to begin to bridge the gap between social science research and
actual law enforcement practice. Social science and the law
have long had an uneasy relationship. The law's generic
skepticism of social science, while too often well-founded in the
past, today risks deteriorating into a counter-productive bias if
the legal system fails to recognize the genuine strides that social
science has made in recent decades. Justice's timely initiative
therefore offers some hope that the legal system, especially the
criminal justice system, may eventually meet the challenge of
developing ways to take advantage of valid research findings.

There are several commendable aspects of the Guide itself.
Its general acknowledgment that eyewitness evidence must be
handled with the same degree of care for its own kind of fragil-
ity as is physical trace evidence makes a key point. More spe-

14. Id. at 3.
15. Procedures, supra note 3, at 604. Procedures is the product of a subcommittee of
leading authorities appointed by the Executive Committee of the American Psychology-
Law Society ("APLS"), Division 41 of the American Psychological Association, to review
scientific evidence and make recommendations for optimal procedures for constructing and
conducting lineups and photo spreads. In March 1998, the Executive Committee approved
Procedures as an official Scientific Review Paper of the APLS.
16. See generally Rosemary J. Erickson & Rita J. Simon, The Use of Social
Science Data in Supreme Court Decisions 5-18 (1998) (discussing the "clash of cul-
tures" between social science and the law).
specifically, the Guide contains a number of research-based recommendations that address substantial sources of error in eyewitness evidence.

Unfortunately, however, in ironically reciprocal shortcomings, the Guide fails adequately to address several core problems in both eyewitness interviewing and eyewitness identification. While the Guide’s catalogue of recommendations concerning interviewing does list many of the key points to emerge from the research, it fails to deal with the underlying systemic problems in law enforcement training, practices, and attitudes that contribute to use of interview techniques likely to produce error. In other words, although the Guide gets many of the specific interviewing recommendations right, mere recommendations alone are not likely to effect substantial change in law enforcement behavior. Instead, effective training and perhaps more selective recruitment and assignment of law enforcement personnel are necessary to produce the kind of changes in attitude and behavior necessary to support implementation of proper interviewing techniques. Without such bottom-up reform, law enforcement personnel are likely to continue making the same mistakes when interviewing witnesses.  

Conversely, several specific recommendations to emerge from the research concerning eyewitness identification that probably would have contributed significantly to reducing the risk of error are not adopted by the Guide. In other words, when specific recommendations alone would have made a real difference, because they are relatively easily implemented by top-down policy decisions, the Guide fails to make several critical ones. For example, the Guide declines to recommend a preference for the sequential, rather than the simultaneous, presentation of lineup members or photographs—even though, as the Guide itself acknowledges, research indicates that sequential procedures are less prone to produce false identifications. Another problem is that the Guide fails to include “double-blind” identification procedures (i.e., procedures in which the investigators conducting the lineup or photo array do not know the ac-

17. See infra notes 85-88 and accompanying text.
18. GUIDE, supra note 12, at 9. For discussion of the relative merits of sequential versus simultaneous presentation procedures, see infra notes 123-25 and accompanying text.
tual suspect's identity)—even though, again as the Guide concedes, investigators' feedback to the witness can compromise the identification's validity. As the Guide's own comments imply, these decisions are not based on weakness in the underlying social science research. To the contrary, the recommendation for double-blind administration is listed first in the official Scientific Review Paper of the American Psychology-Law Society, Division 41 of the American Psychological Association on recommendations for lineups and photospreads. The Scientific Review Paper also endorsed sequential presentation but stopped short of formally recommending it in part out of concern—which has proved prophetic—that legal policy makers would neither understand nor accept the recommendation. Rather than a rational judgment of scientific merit or practical utility, the Guide's decisions with respect to those recommendations more likely reflect a partial failure—at least for the time being—of the representatives from the various constituencies that comprised the Working Group to reconcile the differences that divide them.

This article has two goals. The first is to bring to readers' attention both significant potential sources of error in eyewitness evidence that social science research has identified and the Guide's responses to those problems. The second is to comment briefly on the adequacy of those responses. This article will proceed in three additional parts. Part Two will provide an overview of selected aspects of the problems. Part Three will summarize the Guide. Part Four will explain why the Guide's omissions with respect to lineups, photo arrays, and witness interviewing are substantial but unnecessary shortcomings.

19. GUIDE, supra note 12, at 9. For discussion of the advantages of double-blind techniques, see infra notes 86-88, 149-51 and accompanying text.

20. Procedures, supra note 3, at 627 ("The person who conducts the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect").

21. Id. at 639-40.
II. SOME PROBLEMS

A. Memory as Trace Evidence

The essential problem is the failure of investigators to treat eyewitness evidence like physical trace evidence, with the trace residing in the witness's memory. Just as a fingerprint is a physical impression left by the perpetrator on a touched surface, eyewitness evidence consists of a neurological impression encoded and stored in the brain of the witness. No one would seriously raise a categorical objection to proper training of law enforcement first responders, investigators, and technicians in the proper methods of preserving, collecting, storing, and analyzing physical evidence. Decision makers in the process—law enforcement, lawyers, judges, and jurors—generally accept, and often insist, that such procedures will at least in theory be based on principles developed through science.

Consider one of the most commonplace examples of forensic evidence: blood alcohol concentration as measured by a breath test such as the Breathalyzer. The physical trace is the concentration of alcohol (ethanol) in a sample of expelled "deep

24. See, e.g., ANDRE MOENNESS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 947 (4th ed. 1995) (describing safeguards required by some courts for defense and other scientific access to DNA typing information). This point should not be taken too far. There are some important respects in which other forms of trace evidence, including DNA testing, could be handled in a more scientific manner. In particular, use of "blind" procedures—considered a sine qua non in academic science—is rare in forensic science. "Analysts in crime laboratories often know the history of the case and the identity of the samples when they perform and interpret laboratory tests. Indeed, forensic scientists are often in close communication with detectives while they are analyzing samples and interpreting results." William C. Thompson, Examiner Bias in Forensic DNA Testing, 1 PSYCHOL. EXPERTISE AND CRIM. JUST. 313, 313 (A.B.A./Amer. Psychol. Ass’n Conference Proceedings) (on file with author). See also William C. Thompson, A Sociological Perspective on the Science of DNA Testing, 30 U.C. DAVIS L. REV. 1113, 1130 & nn.42-43 (1997) (noting resistance to use of blind procedures within forensic community). Professor Thompson captured the irony of this contrast when he trenchantly observed, '[t]hat blind procedures are considered essential for studying the mating habits of birds but not for determining guilt or innocence of criminal defendants is another measure of the difference between forensic and academic science." Id. at 1120 n.42. And he pointed out the potential extreme consequences of adversarial "science" in the courtroom, which manifested in the case of West Virginia forensic serologist Fred Zain, who, in over 130 criminal cases, overstated, misstated, or altered test results to help achieve convictions. Id. at 115-16.
lung" or "alveolar" air, which is converted by a formula (known as the partition rate) into a percentage concentration of alcohol in the bloodstream.\textsuperscript{25} Breathalyzer operators are routinely trained in the proper methods for collecting and analyzing the sample. The goal is an accurate measurement. The primary concerns are collecting a breath sample of adequate volume, taking care that the sample is not contaminated (for example by residual alcohol in the mouth), and ensuring that the machine accurately analyzes the sample (free, for example, from the potentially distorting effects of radio frequency interference) and reports the results. The science on which the Breathalyzer is based determines the necessary amount of the sample, the best means for collecting it, the likely sources of contamination, and how the sample is to be analyzed and the results are to be reported.

Eyewitness evidence, by contrast, often is handled through procedures based on intuition and tradition rather than science. This disparity should hardly be surprising. For many forms of trace evidence, the science came first and had to satisfy legal standards for admissibility before finding evidentiary acceptance in the criminal justice system.\textsuperscript{26} Memory traces reported by eyewitnesses, however, are perhaps the oldest form of evidence, the acceptance of which long antedated any scientific study of its properties.\textsuperscript{27} And memory, unlike DNA identification or forensic pathology, is of course something with which everyone has direct, everyday personal experience. To be sure, many of the common assumptions about how memory works, such as the trace-reinforcing effect of rehearsal, are supported by scientific study. Some conventional assumptions, however, do not withstand scientific scrutiny and some relevant issues to emerge from scientific study may not occur at all to the lay observer.\textsuperscript{28}

\textsuperscript{25} For an overview of the processes of alcohol intoxication testing, see MOENSSENS, \textit{supra} note 24, at ch.3.

\textsuperscript{26} For an overview of legal acceptance of DNA typing in criminal and civil cases, whether by judicial ruling or legislation, see \textit{id}. at 938-63.

\textsuperscript{27} One of the earliest attempts at the scientific study of eyewitness testimony is HUGO MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY & CRIME (1908).

\textsuperscript{28} This point has proved true in connection with eyewitness identification, in which a number of "commonsense" assumptions are not supported by the scientific evidence. See \textit{infra} notes 207-32 and accompanying text.
B. Interviewing

The same kinds of general concerns identified above in connection with collecting, analyzing, and reporting Breathalyzer evidence or other forms of trace evidence also arise in connection with eyewitness evidence. Assume for the moment that the investigator’s goal is accuracy. The investigator must recover a sufficient amount of relevant material to be useful. The information must come from the witness’s own memory rather than from some other source, i.e., the investigator must avoid contamination of the trace. The witness must be able to process or analyze the information and to report it to the investigator in a useful and unimpeded manner.

There is an abundance of research on the processes of human memory. The kind of memory that is of concern here is memory for events, known as “episodic” memory. In simplified form, the basic process can be conceived of as occurring in several stages: acquisition, storage, and retrieval. And, of course, the resultant output of the process takes a special form when it is reported as testimony. A variety of factors can affect each stage of the process. A useful distinction between such factors for present purposes is Gary Wells’ notion of “estimator” and “system” variables.

Estimator variables are those lying outside the control of investigators so that their impact must be estimated retrospectively. For example, just as trace evidence of the so-called “chloride shift” in a sample of ventricular blood to determine cause of death by drowning will dissipate within two to twenty-four hours after death, research has found that event and per-

29. This topic is also discussed infra notes 85-87 and accompanying text.
30. See Procedures, supra note 3, at 613 (observing that “[m]emory theory, for example, involves one of the largest literatures in all of psychology, eyewitness experiments number in the hundreds, and the scientific logic of testing is something to which entire graduate-level courses are directed”).
32. See generally LOFTUS, supra note 1, at xii.
34. Id. at 1548.
35. MOENSSENS, supra note 24, at 697.
petrator factors such as exposure time,\textsuperscript{36} the presence of a weapon (the so-called "weapon focus"),\textsuperscript{37} and the seriousness of the crime\textsuperscript{38} can affect an eyewitness's ability to recall the event or to identify the perpetrator. A number of studies have also shown that "[o]wn-race recognitions are more accurate than other-race identifications."\textsuperscript{39} Individual witness characteristics, such as sex, race, intelligence, and personality traits, "appear to be weakly, if at all related to the tendency to make correct or false identifications."\textsuperscript{40} Other stable individual attributes, such as age and face-recognition skills, do appear to have some impact (young and elderly individuals perform more poorly than adults);\textsuperscript{41} but malleable attributes, such as training, have little impact.\textsuperscript{42}

The foregoing kinds of factors, while certainly relevant to the completeness and accuracy (and hence the evidentiary weight) of eyewitness evidence, are largely outside the control of investigators and are not of immediate concern here.\textsuperscript{43} This article is concerned with "system" variables, those factors that are within the investigator's control and subject to manipulation in a given case. Examples of system variables include the pro-

\textsuperscript{36} For reviews of the literature, see LOFTUS, supra note 1, at 23; BRIAN L. CUTLER & STEVEN D. PENROD, MISTaken IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 101 (1995).

\textsuperscript{37} LOFTUS, supra note 1, at 35-36; Nancy Mehrkens Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 LAW & HUM. BEHAV. 413 (1992). Archival study of actual police cases found that the presence of a weapon has complex effects. \textit{Id}. It did not reduce the quantity of descriptive information the witness was subsequently able to provide to police about the culprit, but it did impair witnesses' subsequent ability to recognize the culprit. Tollestrup, \textit{supra} note 6, at 158.

\textsuperscript{38} CUTLER & PENROD, supra note 36, at 102.

\textsuperscript{39} \textit{Id}. at 104.

\textsuperscript{40} \textit{Id}. at 85. For research indicating that individual differences on several variables—including self-monitoring, performance on a neuropsychological facial recognition test, and cognitive style—are related to eyewitness identification accuracy, see Harmon Hosch, Individual Differences in Personality and Eyewitness Identification, in ADULT EYEWITNESS TESTIMONY 328 (David Frank Ross et al. eds., 1994).

\textsuperscript{41} For discussion of children as eyewitnesses, see \textit{infra} notes 54-59 and accompanying text.

\textsuperscript{42} CUTLER & PENROD, \textit{supra} note 36, at 85, 90. Limited research suggests that intoxication may impair perception and acquisition. \textit{Id}. at 88-89.

\textsuperscript{43} Estimator variables are indirectly relevant to the topic at hand because, as discussed in Part III, the sensitivity of legal decision makers to their impact on eyewitness evidence affects the extent to which traditional legal safeguards (such as the presence of counsel, the motion to suppress, cross examination, closing argument, and jury instructions) address the systemic problems discussed below.
cedures for conducting lineups or photo-spreads (such as the instructions to the witness, the selection of "filler" or "distractor" individuals, and the sequential or simultaneous presentation of lineup members) and techniques for conducting eyewitness interviews. The critical point to emerge from decades of research is that these system variables also can have a dramatic impact on the accuracy of eyewitness evidence.

Although under optimal conditions the natural processes of memory retrieval apparently perform at fairly high levels of accuracy, many things, some of them quite common in law enforcement interviewing, can alter those processes. As Ron Fisher explains, people approach the recollection of events as a problem-solving task:

The solution, as in other problem-solving settings, depends on combining several reliable sources of information, including the witness's internal mental representation of the event, general knowledge about the world or more specific knowledge of how similar crimes occur, and information introduced by other credible participants in the investigation (the police interviewer, other witnesses, the media).

Witnesses face not only a cognitive problem-solving setting created by the recollection task but also a social problem-solving task presented by the encounter with law enforcement investigators. Both issues give rise to the risk that the witness will respond from sources other than his or her own independent recollection; in other words, they pose a likely source of contamination of the memory trace. In addition to the risk of contamination, investigators also face the problem of recovering a sufficient volume of useable trace evidence from eyewitnesses. Witnesses may recall irrelevant information, may fail to recall or to report relevant information, and may report less than they actually have stored in memory. The challenge for investigators—again, as with other forms of trace evidence—is thus to

44. Ronald P. Fisher, Interviewing Victims and Witnesses of Crime, 1 PSYCHOL., PUB. POL'Y, & L. 732, 41-42 (1995) (reviewing laboratory studies finding that uninfluenced recollection is largely accurate (even for young children), with free recall accuracy rates above 90% of recalled material across studies).
45. Id. at 738.
46. CUTLER & PENROD, supra note 36, at 113 (discussing social context of eyewitness identification procedures); see infra notes 129-30 and accompanying text.
47. Fisher, supra note 44, at 745.
maximize recovery of useful material while minimizing contamination.

The susceptibility of memory trace evidence to post-event contamination—the so-called “misinformation” or “post-event information contamination” effect—is well-documented. Although theoretical accounts of the effect’s mechanism differ, “there is little argument that the phenomenon of postevent suggestibility exists, that it is robust, and perhaps most important, that witnesses truly believe that they observed an event that was only suggested.” Of particular relevance to eyewitness identification, there is evidence that “the misinformation effect is generalizable to descriptions of the people involved in the activities viewed by the subjects. Under certain conditions, the subject may totally misidentify the person in question.” The effect is most readily seen when the misinformation involves peripheral details rather than central features of the event and ob-


49. A number of mechanisms have been posited to account for the effect. One category consists of “memory interference” theories. Loftus originally proposed that the postevent information “overwrites” or erases the original memory trace, so that the new information is incorporated into a “blended” or “synthesized” recollection. LOFTUS, supra note 1, at 110-33. In an alternative view, Lindsay and colleagues have described the problem as one of “[s]ource monitoring,” which “refers to the hypothetical cognitive processes by which people identify the sources of their recollections.” D. Stephen Lindsay, Memory Source Monitoring and Eyewitness Testimony, in ADULT EYEWITNESS TESTIMONY, supra note 40, at 27. Under this view, the witness who is supplied information after the event is unable to distinguish the sources—whether from external sources or from memory—of subsequently retrieved information. Another category of theoretical formulations regards the original memory as existing more or less intact but as less likely to be retrieved than the post-event information. Yet another perspective sees the effect largely in terms of social persuasion, in which the subject is persuaded by a highly credible source to alter his or her beliefs about the event. For an overview of these various perspectives, see BROWN ET AL., supra note 48, at 217-235, who concludes first that “a strong interpretation of the Loftus memory impairment hypothesis has been given very little support” by the past decade’s research and second that “[i]t is perhaps safer to assume that the misinformation effect is not a unitary phenomenon, but rather represents a number of variables and a complex interaction among these variables.” Id. at 233.

50. Fisher, supra note 44, at 740. For evidence that “[w]itnesses can exhibit strong belief in their memories, even when those memories are verifiably false,” see Kenneth R. Weingardt et al., Reports of Suggested Memories: Do People Truly Believe Them?, in ADULT EYEWITNESS TESTIMONY, supra note 40, at 3-26.

51. BROWN, ET. AL., supra note 48, at 215.
jects rather than activities and if its source is regarded as highly credible.\textsuperscript{52} According to one review,

we might say that the misinformation effect is largely a function of uncertainty, either because the subject failed to encode or incorrectly encoded the original memory, or because the subject was asked about peripheral details less likely to be clear in [his or her] memory. The magnitude of this uncertainty effect is greatly increased in a social context in which the misinformation is suggested by a highly credible source (like the experimenter or a police interrogator) who asked questions in a particular way (response bias) so as to permit the subject to shift his or her decision criteria, especially for uncertain experiences, in the direction of making memory commission errors.\textsuperscript{53}

The suggestibility of child witnesses has been an area of considerable controversy, but the evidence indicates that a witness’s age may be a relevant variable.\textsuperscript{54} According to an exhaustive review of the literature, “contrary to the claims made by some, . . . there do appear to be significant age differences in suggestibility, with preschool-aged children being disproportionately more vulnerable to suggestion than either school-aged children or adults.”\textsuperscript{55} That review also found that “children can indeed be led to make false or inaccurate reports about very crucial, personally experienced, central events.”\textsuperscript{56} Nevertheless, both children and adults, under the right circumstances, can make reliable witnesses.\textsuperscript{57} The reviewers’ comments about system variables in interviewing child witnesses are also relevant to adult witnesses and are worth noting:

If the child’s disclosure was made in a nontreating, non-suggestible atmosphere, if the disclosure was not made after repeated interviews, if the adults who had access to the child prior to his or her testimony are not motivated to dis-

\textsuperscript{52} Id. at 213-17; Loftus, supra note 1, at 63, 97-99.
\textsuperscript{53} Brown, ET. AL., supra note 48, at 234.
\textsuperscript{54} For a comprehensive review of the legal and policy issues surrounding child witnesses, see Lucy S. Mcgough, Child Witnesses: Fragile Voices in the American Legal System (1994).
\textsuperscript{56} Id. at 432.
\textsuperscript{57} Note, however, that child eyewitnesses are much more prone than adults to make false-positive identifications in culprit-absent lineups. See infra note 125.
tort the child's recollections through relentless and potent suggestions and outright coaching, and if the child's original report remains highly consistent over a period of time, then the young child would be judged to be capable of providing much that is forensically relevant. The absence of any of these conditions would not in and of itself invalidate a child's testimony, but it ought to raise cautions in the mind of the court.58

Thus:

[t]he overall strength of suggestive influences is determined by a multitude of factors, including perceived authority and trustworthiness of the source of suggestions, repetition of suggestions, perceived plausibility of the suggestions, imagability of the suggestions, and memory-monitoring response criteria (i.e., the amount and kind of cognitive evidence people require before they accept an image or idea as a memory).59

Police interviews of eyewitnesses potentially combine many of those factors. They are conducted by an authority figure who, from the cooperative witness's standpoint, may be deemed trustworthy. The social demand characteristics of the situation provide some motivation for the witness to accept information provided by the interviewer and to proffer responses the witness believes will please the interviewer. The witness may repeatedly be exposed to suggestive information, not only from the interviewer but also from the media and other witnesses. There will often be uncertainty surrounding the event. The content of any suggested misinformation may be for peripheral details (such as physical descriptions of the culprit) and may generally be plausible. The interviewer may be highly motivated to obtain a statement or identification that is consistent with a preconceived version of the event.

58. Ceci & Bruck, supra note 55, at 433. See also Mary Ann King & John C. Yuille, Suggestibility and the Child Witness, in CHILDREN'S EYEWITNESS MEMORY 24, 28-31 (Stephen J. Ceci et al. eds., 1987) (describing ways in which "potential suggestiveness of questioning and of identification tasks has convinced us that any memorial or cognitive deficits in children are amplified by the structural dynamics operating in the interview situation").

Interviewers can convey post-event information in a variety of ways from the obvious to the subtle. The most obvious is simply to volunteer the information to the witness. But contamination can also occur in the form of leading (or misleading) questions that suggest details about the event. Although data concerning the incidence of leading questioning in actual police interviews are sparse, “a cautious approach is to assume that leading suggestions do occur with some regularity.” In view of the potential impact of post-event suggestions on the witness’s recollection under the misinformation effect, “this represents a major source of error in the legal system.”

Another way that interviewers can compromise the integrity of the witness’s recollection is to encourage guessing, which can increase the likelihood that the witness’s response will consist of inference, assumption, and conjecture rather than recall. Individuals who are not subjected to external pressures generally can determine whether they know or recall a particular piece of information or whether they are guessing or making assumptions. In other words, for a particular uninfluenced individual, there is often a fairly high correspondence between his or her confidence and accuracy. (Note that this is not the same as saying that more confident witnesses tend to be more accurate; available evidence suggests that the confidence-accuracy relation between witnesses is fairly low.) The key word here is “uninfluenced”: witnesses under pressure to tell more than they know may well produce more information but at lower rates of accuracy and distorted levels of confidence.

Of course, the most direct way to cause a witness to guess is simply to ask the witness to do so. But a similar message can also be conveyed implicitly. Because the interview is a social setting, the witness will make conventional assumptions about the nature of the communication with the interviewer and often will try to please him or her. Asking the same question repeat-

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60. Fisher, supra note 44, at 739.
61. Id. at 740-41.
62. Id. at 741.
63. Id.
64. See infra note 130-32 and accompanying text.
65. See infra notes 67-72 and accompanying text. For discussion of the distorting effect of post-identification feedback on witness confidence, see infra notes 127-52 and accompanying text.
edly, for example, can signal to the witness that his or her original answer was unsatisfactory and that the investigator wants a different reply. If the witness’s original answer exhausted his or her recall of that aspect of the event or the witness is highly suggestible and anxious to please, the witness may turn to other sources to meet the investigator’s implicit demand for a more detailed or different reply. Another way to provoke the witness to guess is to ask multiple-choice questions (which can in effect be another form of leading question), especially if the investigator does not explicitly assure the witness that it is acceptable to give an “I don’t know” response if the witness is unsure.

Because research has also shown that post-event questioning “can lead to increased levels of confidence for previously provided responses to questions about an episodic memory regardless of whether that information is accurate,” such questioning can eventually yield inaccurate recollection in which the witness has relatively high confidence.

As discussed below in connection with eyewitness identification, contamination can thus occur both with respect to the accuracy of witnesses’ recollection and their subjective assessment of that accuracy (i.e., their confidence). Research has found that the confidence-inflating impact of post-event questioning was the largest for inaccurate responses, including responses to questions about the witnesses’ memory for an object that did not even exist in the original event:

When witnesses are questioned about their memory for an object that was not even in an original crime episode, they may become increasingly more confident in that clearly nonveridical memory. In conjunction with the distorting effects of misleading postevent information, this consequence of postevent questioning can become doubly troublesome: Not only might the witness produce an inaccurate memory report, but as a result of the postevent questioning,

69. See infra notes 127-52 and accompanying text.
the witness may also report an artificially inflated level of confidence for that inaccurate memory. 70

Because the legal system places so much weight on witness confidence as an indicator of witness credibility, inflated confidence judgments in inaccurate recollection can seriously compromise the fact-finding process. 71

The solution is two-fold. First, to the extent possible, the investigator should avoid interviewing techniques (such as leading questions and volunteering information about the event) that contribute to contamination of the accuracy of witness memory. Second, as discussed below in connection with eyewitness identification, “it may be possible [partly] to ‘shield’ witnesses from the effects of postevent questioning by asking them to provide confidence ratings early on in the legal process. . . .” 72 The practice of securing confidence ratings can help in two ways. It creates a contemporaneous baseline record of the witness’s uninflated confidence against which to compare subsequent spurious increases. And it might moderate potential inflationary tendencies because of witnesses’ desire to appear consistent. 73

As discussed above, an investigator handling trace evidence must not only avoid contamination but must also collect sufficient quantities of material. The problem for investigators in this regard is that there often is a mismatch between the manner of reporting that maximizes the likelihood that the witness will exhaust his or her independent recollection of the event and the manner of collecting information typically employed by law enforcement investigators. At best, investigators may be pressed for time, have a predetermined menu of questions dictated by the requirements of a particular case, or have an interpersonal style influenced by a variety of experiences not necessarily transferable to interviewing cooperative witnesses. 74 At worst,

70. Shaw, supra note 68.
71. See infra notes 131-48 and accompanying text.
72. Shaw, supra note 68.
73. Id.
investigators may sometimes merely be looking for evidence to substantiate preconceived conclusions about the case.\textsuperscript{75}

One of the more promising developments in social science research in this area is the refinement of techniques, supported by both laboratory and field research, known as the Cognitive Interview ("CI").\textsuperscript{76} CI capitalizes on the research findings concerning the accuracy of uninfluenced recovery and likely sources of contamination and inhibition to identify techniques that support the natural processes of memory retrieval by cooperating witnesses. The CI operates from two principles of memory: one, that "the effectiveness of a retrieval cue is related to the amount of feature overlap with the encoded event"; and two, that "there may be several retrieval paths to the encoded event, so that information not accessible with one retrieval cue may be accessible with a different cue."\textsuperscript{77} The CI's four general instructions derive from those principles: (1) "mentally reinstating the environmental and personal context that existed at the time of the original event," (2) "reporting everything, even partial information, regardless of its perceived importance," (3) "recounting the events in a variety of orders," and (4) "reporting the events from a variety of perspectives."\textsuperscript{78} Researchers' awareness of the differences between field and laboratory conditions led to a revision of the CI to include measures to address issues associated with the witness's emotional state, attention level, and verbal skills; to improve communication between the interviewer and the witness; and to minimize the risk that the varied-retrieval techniques might provoke guessing or fabrication.\textsuperscript{79} The CI, like a structured clinical interview, proceeds in a planned sequence to maximize recovery of useful information: the rapport-establishing stage, the open-ended narration stage, the probing stage, the review stage, and the closing stage.\textsuperscript{80}

\textsuperscript{75} See infra notes 85-89 and accompanying text (discussing motivations and "double-blind" assessment).

\textsuperscript{76} See generally Ronald P. Fisher, et al., Improving Eyewitness Testimony with the Cognitive Interview, in ADULT EYEWITNESS TESTIMONY at 245-69 (describing the CI and underlying research).

\textsuperscript{77} Id. at 246 (citations omitted).

\textsuperscript{78} Id. at 247 (citations omitted).

\textsuperscript{79} Id. at 250.

\textsuperscript{80} Id. at 253. For a more complete account of the CI, see RONALD P. FISHER & R. EDWARD GEISELMAN, MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING (1992). For a description of the structured clinical interview, see
The CI also provides guidance about what the interviewer should not do. For example, although the use of open-ended questions to prompt the witness to provide a narrative account of the event is a well-recognized technique, law enforcement investigators may nevertheless frequently interrupt the witness. Such interruptions can derail the witness’s natural memory processes, encourage cognitive passivity on the witness’s part, and discourage volunteering or elaboration of information. These problems are compounded when interruptions take the form of rapid-fire, closed-ended questions (sometimes from a standard list of questions), or questions that prematurely seek to take the witness back to a previous point in the narrative flow. Overall, the CI calls for a more patient, reflective, and supportive interpersonal style than some law enforcement investigators may either possess dispositionally or have developed during their patrol days and through contact with non-cooperative subjects. The CI also takes more time than the standard law enforcement interview, because it does not seek quickly to “get to the point,” but instead tolerates and even encourages the witness to recall every aspect of the event, no matter how ultimately tangential to the investigation’s focus. It is up to the investigator later to cull through the interview material, which preferably will have been recorded both to preserve it and to reduce the cognitive load of memory and note-taking on the investigator during the interview.

Beyond the specifics of the actual interview, Ron Fisher, one of CI’s developers, has described systemic issues that he believes contribute to the risk of error—from both contamination and insufficient trace recovery—in eyewitness interviews. In addition to inadequate training, over-emphasis on an aggressive interpersonal style, and a work-assignment system in which rookies are assigned to routine patrol duties where they acquire interviewing techniques poorly suited to maximizing accurate recall from cooperative witnesses, Fisher also has pointed to
possible motivational biases as a potential source of error.\textsuperscript{85} In an adversarial, politically influenced system that provides strong external incentives to obtain convictions, investigators who (on whatever basis) believe they already have identified the guilty party may be under pressure to search more diligently for evidence that inculpates rather than exonerates. In such situations, the most efficient approach would be to ask direct, closed-ended, and often leading questions to obtain witness responses that confirm the investigator’s suspicions.

Fisher recommends structural reforms to address these issues, which focus primarily on training and selection of individuals more temperamentally suited to the requirements of CI, but which also include recording of interviews and perhaps “double-blind” interviewing (i.e., an interview by an investigator who has only a general background knowledge of the event).\textsuperscript{86} The concept of “double-blind” investigation is familiar to scientists as a means to address the threat to the validity of research results posed not only by the possibility of data contamination (through communication, perhaps unintentionally, of misinformation to the witness) but also by the natural human tendency, known as the “confirmatory” or “expectancy” bias, to take the mental short-cut of attending more closely to information that confirms existing beliefs.\textsuperscript{87} “Double-blind” procedures also reduce the distorting effect of the phenomenon known as “demand characteristics,” in which the subject’s responses are distorted by his or her understanding of the investigator’s goals.\textsuperscript{88} In other words, eyewitness interviewing and identification procedures should be more than an investigator’s self-fulfilling prophecy. This issue, which also arises in connection with lineup and photo array procedures, is discussed more fully in the ensuing section.\textsuperscript{89}

\textsuperscript{85} Id. at 753-56.
\textsuperscript{86} Id. at 753-58.
\textsuperscript{87} For an overview of these issues, see Procedures, supra note 3, at 627-30. For discussion of forensic science’s pervasive failure to use blind procedures, see supra note 24.
\textsuperscript{88} Id.
\textsuperscript{89} See infra notes 127-52 and accompanying text.
C. Identification

A staple of the investigatory process involving eyewitnesses is the identification procedure through which the witness selects the perpetrator from a group of other individuals presented either in a live lineup or in an array of photographs. (Although there are important differences, such as the lack of right to counsel at a photo-spread,90 for present purposes the live lineup and photo-spread techniques can be treated the same and will hereafter be referred to in this section simply as "lineups."91) The ostensible purpose of having the witness select the suspect from a lineup is to reduce the inherent suggestiveness of having the witness confirm or disconfirm whether a single individual presented by investigators (through a procedure known as a "showup") is the culprit.92

Another aspect of the lineup's purpose involves the distinction between recall and recognition. When the witness provides a verbal pre-lineup description of the perpetrator—which typically consists of a list of various physical features such as height, weight, eye and hair color, facial hair, race, gender—the witness is engaged in a recall task. The points discussed above concerning witness interviewing would apply at that stage. When the witness is asked to make an identification, presumably some additional information is sought beyond the recalled menu of features. Ideally, that additional information would consist as

90. The right to counsel attaches to live lineups, in which the defendant is personally confronted by the witness, that are conducted after initiation of adversary criminal proceedings against the accused. Moore v. Illinois, 434 U.S. 220, 231 (1977); Kirby v. Illinois, 406 U.S. 682, 690 (1972). The right does not attach to photo identification procedures. United States v. Ash, 413 U.S. 300, 321 (1973). Note also that the admission of evidence of a lineup in which counsel was not present is not per se reversible error but is instead subject to "harmless error" analysis under United States v. Wade, 388 U.S. 218, 239-42 (1967).

91. Note that research does not reveal a lower accuracy rate for photo-spread techniques as opposed to live lineups. Wells & Seelau, supra note 6, at 766.

92. For discussion of the suggestibility of showups, see infra notes 171-73 and accompanying text. At the risk of stating the obvious, it is important to distinguish between "suspect" and "culprit." The culprit is the actual perpetrator of the crime and, presumably, is the person who left a trace on the witness's memory. As Luus and Wells put it, "The suspect might or might not be the culprit. The witness's prelineup description is of the culprit who is not necessarily the suspect. The witness's identification is of the suspect who is not necessarily the culprit." C.A. Elizabeth Luus & Gary L. Wells, Eyewitness Identification and the Selection of Distractors for Lineups, 15 LAW & HUM. BEHAV. 43, 48 n.2 (1991).
much of recognition as possible beyond the information already recalled, and it would be as free as possible of the witness's inferences, guesses, and adaptation to pressure from the investigator. 93

A substantial body of research indicates that several variables under the control of investigators—i.e., "system" variables—contribute to errors in eyewitness identification in predictable and preventable ways. 94 Those variables can be roughly organized into two categories. The first involves what the leading researcher in this area, Gary Wells, refers to as the "relative judgment process," or the tendency of witnesses to select the individual who most closely resembles their mental representation of the suspect. The second involves the familiar problem of contamination of the witness's memory trace. Each is discussed in turn below. 95

1. Relative Judgment Process

Research indicates that the cognitive processes associated with relative judgments differ from those involved in "absolute" judgments. In the relative judgment process, it appears that the witness consciously compares various features of the members of the array and selects the individual who, on balance, most closely resembles the witness's mental representation of the perpetrator. Relative judgments take more time than do absolute judgments, presumably because a more conscious, effortful, and detailed comparison process is engaged. Again, the outcome of the process is a choice from among several possibilities. How the witness actually articulates his or her response to the lineup may be influenced by the setting and the investigator's instructions; but, under the relative judgment process, the witness's selection of a particular individual means, in effect, that "this is

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93. For discussion of the distinction between recall and recognition in the context of witness identification, see Luus & Wells, supra note 92, at 46. For elaboration of the principle that "[t]he purpose of a lineup is to uncover information in an eyewitness's memory that was not available in recall," see Gary L. Wells, et al., Recommendations for Properly Conducted Lineup Identification Tasks, in ADULT EYEWITNESS TESTIMONY, supra note 40, at 223, 225-26 [hereinafter Lineup Identification Tasks].

94. For discussion of the distinction between "system" and "estimator" variables, see supra notes 33-43 and accompanying text.

95. The ensuing discussion applies to adult eyewitness. Eyewitness identification by children presents special problems. See infra note 125.
the one who, compared to the other people in the lineup, most looks like the person I saw running out of the convenience store that night."96 The absolute judgment process, by contrast, appears to involve a more automatic recognition of the subject (i.e., that the suspect looks sufficiently like the person in the witness’s memory to meet some internal threshold of recognition). It takes less time and probably involves a more holistic process: witnesses have reported that the face “just popped out at me.”97 The witness, in effect, when using this process, is stating, “that’s the guy I saw running out of the convenience store that night!”

The relative judgment process apparently works adequately as a problem-solving strategy when the actual perpetrator is in the lineup. In other words, it is a useful method for making accurate (i.e., true positive) identifications. This makes intuitive sense. After all, the actual culprit will be the person who, of all the lineup members, most closely resembles himself. The difficulty arises when the actual culprit is not in the lineup, but another suspect who resembles him is. In that case, the relative judgment effect increases the chances that the witness will incorrectly select someone from the lineup—probably the suspect—rather than correctly state that the culprit is not among those individuals presented (i.e., make a false positive identification). In other words, the relative judgment process is a problematic process for avoiding false identifications (i.e., for making true negative judgments). Research has shown that, using standard lineup techniques, eyewitnesses can make true positive identifications in culprit-present lineups, but also have a high rate of false positives in culprit-absent lineups: “Eyewitnesses are fairly efficient at selecting the actual culprit when the culprit is in the lineup but have great difficulty not selecting someone when the culprit is not in the lineup.”98 The problem, of course, is that when the witness’s selection is used as the primary basis for determining whether the selected person is guilty,
the relative judgment process greatly increases the risk of erroneous conviction.

Research has identified several factors that contribute to the risk of error resulting from the relative judgment process. The first concerns instruction bias. Simulation studies have found that when witnesses are led to believe that the culprit is in the lineup and are not explicitly given the option of replying that the culprit is not present, a large percentage will attempt an identification even when the actual culprit is absent. But when witnesses are given unbiased instructions—i.e., specifically warned that the witness may or may not be present and are offered the opportunity to give a "none-of-the-above" response—the false identification rate drops substantially. Note that giving such instructions does not necessarily reduce the rate of accurate identifications and hence does not simply inhibit the witness's overall willingness to make an identification.

Wells' "removal-without-replacement" studies, however, indicate that witnesses will still tend to make false identifications even when given unbiased instructions. In those studies, after being given unbiased instructions, witnesses are shown one of two lineups, one with the actual perpetrator (of a staged crime) present and the other from which the perpetrator has been removed and not replaced by someone else. Results strongly indicate the operation of a relative judgment process: a substantial percentage of the witnesses who had correctly identified the actual culprit did not switch to the "not there" response upon removal without replacement of the culprit, as they would have done were they using an absolute judgment process, but instead switched to another member of the lineup (usually the person who next most closely resembled the actual culprit).

Wells and his colleagues point to at least three other contributors to the relative judgment effect's impact on error rate: individual differences in the tendency to make relative judgments, the selection of distractor or "foil" individuals to com-

99. Id.
100. Id. See also CUTLER & PENROD, supra note 36, at 115-23 (reviewing literature and concluding that "[t]he research shows that biased instructions substantially increase the likelihood of false identifications").
101. Wells & Seelau, supra note 6, at 769.
102. For summaries of these studies see Procedures, supra note 3, at 614-15; Wells & Seelau, supra note 6, at 770.
pose the lineup, and the manner of presentation of the lineup. The first of these issues involves a phenomenon familiar to social science research using human subjects: *response bias.* Some individuals are more prone than others to give a particular kind of response; e.g., some people tend to be "yea-sayers," others "nay-sayers." Research suggests that some people are more prone to make relative judgments, even after being given an unbiased instruction. One way to address this problem is to conduct a "blank" lineup, which is a kind of control trial in which the witness is presented with a lineup consisting entirely of persons known to be innocent. Use of this technique gives some indication of the witness's propensity to make false identifications. Witnesses who pass this control test are far less likely to make a false identification on subsequent real lineups than are witnesses who fail it, with little reduction in accurate identification rates.

The next contributor to the impact of the relative judgment effect is *foil bias.* This term refers to the selection of known-innocent fillers, called "distractor" or "foil" individuals, who bear little resemblance to the description of the perpetrator, so that the suspect in the lineup stands out as most closely resembling the culprit. (Of course, as the researchers note, foils should not be so uniform as to achieve a "clone" effect, making recognition of the perpetrator difficult.) Once again, this contributor to the relative judgment effect is a serious practical problem when the actual perpetrator is not in the lineup (i.e., if the suspect is actually innocent). False identification of a suspect, as opposed to the mistaken choice of a foil, is a substantial step down the road to an erroneous conviction. According to Wells' review,

if the innocent suspect matches the description of the culprit whereas the distractors do not, the suspect stands out from the other lineup members in a way that increases the chances that he or she will be falsely identified. . . . The

103. Indeed, some psychological tests have scales to detect this effect. *See, e.g.,* KENNETH S. POPE, ET AL., THE MMPI, MMPI-2, & MMPI-A IN COURT; A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS 98-109 (1993) (describing measures of response invalidity on the MMPI and MMPI-2).
104. Wells & Seelau, *supra* note 6, at 770.
105. *Id.*
use of distractors who match the description of the culprit reduces the chances of a false identification by increasing the chances that the eyewitness will select a distractor (rather than the suspect) as the relatively better match to the culprit.\textsuperscript{107}

Note that unbiased selection of foils does not shift the witness’s selection strategy from relative judgment to automatic judgment (as evidenced by the fact that manipulation of foil selection does not have much impact on the rate of identification—witnesses still tend to make a selection from an unbiased array at about the same overall rate).\textsuperscript{108} Instead, it reduces the relative probability that an actually innocent suspect will be falsely identified: “use of proper distractors [generally] does not interfere with the likelihood of eyewitnesses identifying the actual culprit in culprit-present lineups. In other words, using distractors who match the description of the culprit does not ‘protect the guilty.’”\textsuperscript{109}

In several special situations other considerations may also need to be taken into account to avoid foil bias in composing lineups. One occurs when the eyewitness’s description does not resemble the suspect. (This could occur because the suspect is not the culprit; because the witness’s memory of specific features is in error; perhaps because of poor encoding or post-event contamination; or because other evidence apart from eyewitness recall, such as fingerprints, implicates the suspect). In such cases, researchers recommend basing foil composition on a combination of features from the witness’s description of the culprit and from the suspect. In essence, the recommendation is that distractors match the witness’s description except when there are specific differences between the description and the suspect, in which case the suspect’s appearance should control distractor selection for that feature.\textsuperscript{110}

\begin{thebibliography}{9}
\bibitem{} Wells & Seelau, \textit{supra} note 6, at 771 (citations omitted).
\bibitem{} \textit{Id.}
\bibitem{} \textit{Id.} at 771-72. Wells and Seelau note, however, that the match-to-suspect foil selection strategy “can produce reductions in the likelihood of false identification (in a culprit-absent lineup) at a cost of reduced accurate identifications (in a culprit-present lineup), which is merely trading one type of error for another.” \textit{Id.} at 772 n.2, citing Gary Wells, et. al., \textit{The Selection of Distractors for Eyewitness Lineups}, 78 J. APPLIED PSYCHOL. 835 (1993).
\bibitem{} Luus & Wells, \textit{supra} note 92, at 52-53. Luus and Wells offer the following example:
\end{thebibliography}
Another special circumstance arises when the eyewitness's description is so specific about unique characteristics, such as scars or tattoos, that an unbiased set of distractors cannot be composed. In such cases, the literature reflects two alternative approaches. The one recommended by the APLS Scientific Review Paper is that law enforcement forgo the lineup altogether as adding nothing of evidentiary value: "A recognition memory task (i.e., a lineup) seems unnecessary when an eyewitness' recall is so complete that he or she describes specific idiosyncratic physical features of the culprit." If law enforcement is nevertheless determined to conduct a lineup (perhaps for its persuasive appeal to the jury), then researchers recommend that investigators either artificially create the unique characteristics on all distractors or cover up those features on all lineup members.

A third issue with respect to lineup composition concerns so-called "default values" (i.e., commonplace but non-described features) in witnesses' descriptions. This problem is most likely to arise in vague descriptions and could produce a biased lineup that nevertheless literally complies with the match-to-description recommendation. For example, a witness might not mention anything during the pre-lineup description about a male culprit's facial hair. The witness's "default value," i.e., the assumed understanding that "goes without saying," might be for a clean-shaven male. Investigators could compose a lineup that matched the witness's description but nevertheless was highly biased in which the suspect was clean-shaven and the foils were all bearded. A related problem arises when the suspect has a unique feature that the witness did not mention when describing the witness describes the culprit as a white male, 21-25 years old, a protruding chin, dark hair, about 165 pounds, and 5'9" tall. Suppose further that the suspect has these characteristics except that his chin is actually somewhat receding and he is (as well as appears to be) 32 years old. Here we call for a joint strategy. In this case, distractors [sic] should be white males, around 32 years old in appearance with slightly receding chins and dark hair, around 165 pounds, and around 5'9" tall.

111. Procedures, supra note 3, at 634. For discussion of the distinction between recall and recognition tasks, see supra note 93.
112. Luus & Wells, supra note 92, at 53.
113. For discussion of this problem, see R.C.L. Lindsay, et al., Default Values in Eyewitness Descriptions: A Problem for the Match-to-Description Lineup Foil Selection Strategy, 18 LAW & HUM. BEHAV. 527 (1994); Procedures, supra note 3, at 633-34.
114. Procedures, supra note 3, at 633.
The perpetrator.\textsuperscript{115} The APLS Scientific Review Paper addresses both problems with its general recommendation that "[t]he suspect should not stand out in the lineup or photospread as being different from the distractors based on the eyewitness's previous description of the culprit or based on other factors that would draw extra attention to the suspect."\textsuperscript{116}

A fourth problem is presented when there are multiple eyewitnesses whose descriptions of the culprit vary somewhat. Researchers recommend that law enforcement officers compose separate lineups for each witness in such cases.\textsuperscript{117} Although this procedure will be more expensive and time-consuming for law enforcement agents, it avoids a potentially serious problem familiar to social scientists but not immediately obvious to the lay person: "correlated error." If there is some bias in the construction of a lineup, and the same lineup is shown to all witnesses, then that bias is likely similarly to influence the selection of each witness—producing a consistently erroneous result that creates the damaging illusion of greater validity because of inter-witness agreement.\textsuperscript{118}

According to the APLS Scientific Review Paper, the "critical test of whether the distractors were selected properly is the mock witness" procedure.\textsuperscript{119} Under this test, mock witnesses are given the pre-lineup description obtained from the real witness and then shown the lineup. If mock witnesses select the suspect with greater frequency than other lineup members, then it is likely that the lineup is biased to highlight the suspect. At the least, in such a case, it is likely that the selection is being made solely on the basis of the actual eyewitness's recall memory (as manifested in the pre-lineup description) and not on the basis of recognition memory. Thus, a lineup that fails the mock witness test at best adds no incremental evidentiary information and at worst is biased against the suspect.

Finally, the APLS Scientific Review Paper does not recommend a particular size for a lineup, but does point out that "the probability of false identification is inversely related to the

\begin{footnotes}
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 630.
\textsuperscript{117} Luus & Wells, supra note 92, at 54; Procedures, supra note 3, at 634.
\textsuperscript{118} Luus & Wells, supra note 92, at 54; Procedures, supra note 3, at 634.
\textsuperscript{119} Procedures, supra note 3, at 633.
\end{footnotes}
number of lineup members and that there is a diminishing return on this probability with the addition of each lineup member.\textsuperscript{120} Of course, if the suspect is in fact innocent and the lineup is perfectly fair, then the probability of a false identification is \(1/N\), where \(N\) is the number of individuals in the lineup.\textsuperscript{121} But there are some data to indicate that "the real-world identification rates for eyewitnesses viewing culprit-absent lineups is around 60%," so that the probability of an innocent suspect being falsely identified in a six-person lineup is \(1/6\) times 60%, or 10%.\textsuperscript{122}

The foregoing manipulations—to address instruction, response, and foil biases—do not alter the underlying cognitive process that probably is at the root of much false identification in perpetrator-absent lineups. The manipulation found to shift the cognitive process from relative to absolute judgment, i.e., from selection of the most similar among lineup members to recognition of a match to memory, is altering the presentation of the lineup from simultaneous to sequential. In other words, care must also be taken to eliminate \textit{presentation bias} from the lineup (i.e., a tendency to influence the result by the way in which lineup members are presented to the witness). This manipulation forces eyewitnesses to rely on an absolute process by preventing them from making relative comparisons.\textsuperscript{123} In sequential presentation, the eyewitness is given an unbiased instruction (including an explanation that individuals will be presented sequentially), and then is shown a photograph or live individual and asked, e.g., "is this the man you saw running from the convenience store that night?" Witnesses are instructed to answer yes or no. They are not allowed to go back and make compari-

\textsuperscript{120} Id. at 634-35.
\textsuperscript{121} Id. at 635.
\textsuperscript{122} Id. (citing A. Levi, \textit{Identification of the Culprit in the Real World: Implications for Lineup Design} (unpublished manuscript)). Applying Bayes' theorem, Levi has estimated from archival and experimental sources that there is a 0.247 probability of innocence if selected from a lineup that is unbiased with respect to instructions and foils (assuming no \textit{a priori} presumption of guilt or innocence). Avaraham M. Levi, \textit{Are Defendants Guilty If They Were Chosen in a Lineup?}, 22 LAW & HUM. BEHAV. 389 (1998). Note that in a previous set of recommendations, Wells and colleagues, while acknowledging that the selection of any particular number is somewhat arbitrary, urged that lineups "contain at least five appropriate distractors for every one suspect." Lineup Identification Tasks, supra note 93, at 229.
\textsuperscript{123} Wells & Seelau, supra note 6, at 772; Procedures, supra note 3, at 639; Lineup Identification Tasks, supra note 93, at 240-41.
sons to previously administered members of the lineup and the lineup is terminated when the witness makes an identification (so that witnesses cannot wait and see if a better match comes along). A review of research found that "[c]ritical tests of this hypothesis have consistently shown that a sequential procedure produces fewer false identifications than does a simultaneous procedure with little or no decrease in rates of accurate identification." This manipulation, because it directly addresses the cognitive source of the problem, is an especially important component of the set of recommendations advanced by researchers in this area for reducing the risk of false identifications.

124. Wells & Seelau, supra note 6, at 772.

125. Note that the issues concerning identification procedures discussed in the text apply to adult witnesses. Although children over the age of five years typically perform as well as adults when the culprit is present in the lineup, children consistently produce a much higher rate of false positives in culprit-absent lineups. According to one review, all of the available data converges on the conclusion that the reliability of eyewitness identification by children is seriously impaired by the tendency of children to guess. This problem reveals itself most clearly in the failure of children to reject target-absent procedures. Neither training nor alternative identification procedures such as sequential lineups or showups have been successful in reducing this problem. The sequential lineup procedure that works so well to increase rejections with adults is ineffective or even damaging to the identification performance of children. No apparent reduction in these problems appeared to occur with age. Even at the end of elementary school, children's identification performance was inferior to adults, particularly with sequential lineups. At the moment, it is not clear how best to address the issue of what identification procedure to use with children.


A recent study of alternative identification procedures for child witnesses has hypothesized that the cognitive processes involved in a simultaneous lineup actually consist of both a relative judgment ("which lineup member most resembles the culprit?") and an absolute judgment ("is the most-similar member actually the culprit?"), and that the higher false positive rate of simultaneous lineups results from a failure of the witness to make the second, absolute judgment. Joanna D. Pozzulo, et al., Elimination Lineups: An Improved Identification Procedure for Child Witnesses, 84 J. APPLIED PSYCHOL. 167 (1999). Reasoning that child witnesses are especially prone to fail to make the absolute judgment, Pozzulo and colleagues developed elimination procedures (in which the lineup member who most closely resembles the culprit is chosen, the other members are removed, and the witness is then asked to decide whether the chosen member is in fact the culprit), coupled with especially strong instructions concerning the risks of misidentification of the innocent and explaining how to make an absolute judgment. Simulation studies produced false-positive rates comparable to those of adults.
2. Contamination

The risk that the witness’s independent recollection will be contaminated by post-event information has been discussed above in connection with witness interviews. Research also shows that witnesses’s confidence in the accuracy of their identification can also be affected by post-identification events. These findings pose a real problem for the forensic use of eyewitness identification. According to one review, “[e]yewitness identifications take place in a social context in which the eyewitness’s performance can be influenced by her expectations and inferences, which in turn can be influenced by the verbal and nonverbal behaviors of investigators, the structure of the identification test, and the environment in which the identification test is conducted.”

For example, the witness may infer from the investigators’ zealousness, from the investigators’ comments, or from the fact that the investigators have gone to the trouble of conducting a lineup at all that they are sure they have caught the perpetrator. “A cooperative witness might therefore ‘do her part’ by making a positive identification.”

Most people—including police, prosecutors, jurors, trial judges, and appellate judges—rely heavily on witness confidence as a guide to witness accuracy. People tend to regard confident witnesses as more likely to be accurate than non-confident witnesses:

There is good empirical evidence to indicate that the confidence with which eyewitnesses give identification testimony is the most important single quality of testimony in terms of whether participant-jurors will believe that the witness correctly identified the actual perpetrator. . . . In fact, a confident witness tends to make participant-jurors ignore the witnessing conditions themselves and believe the eyewitness at a rate that exceeds the actual rate of accu-

126. See supra notes 48-73 and accompanying text.
127. See infra notes 137-47 and accompanying text.
128. CUTLER & PENROD, supra note 36, at 113.
129. Id. at 114.
According to one comprehensive review of the literature in this area, including specifically the relationship between witness confidence and accuracy in the context of lineup identifications, this faith in witness confidence as a reliable guide to witness accuracy is misplaced:

In short, it is possible to argue about what is the best generalization about the relation between witness confidence and witness accuracy, but we believe it is safe to conclude from existing research under the conditions that typically prevail in short criminal encounters between victims-witnesses and perpetrators, witness confidence in ability to identify a perpetrator (prelineup confidence) is largely unrelated to accuracy, and confidence in having made a correct identification is, at best, only modestly associated with identification accuracy.\textsuperscript{132}

The legal system also formally looks to other factors, themselves also largely based on the witness’s recollections or impression, in evaluating the accuracy of eyewitness identification. Witnesses at trial are often asked questions about the event (e.g., how clear their view was of the perpetrator) and the identification procedure (e.g., how quickly and confidently they identified the suspect). The United States Supreme Court has listed specific factors to be considered in evaluating eyewitness testimony for purposes of suppression motions, including the witness’s opportunity to view the perpetrator, the witness’s attentiveness to the event, the witness’s pre-lineup description of the event, the witness’s certainty, and the length of time between the event and the identification procedure.\textsuperscript{133}

\textsuperscript{131} Gary Wells & Amy Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 361 (1998).

\textsuperscript{132} Witness Confidence, supra note 130, at 825. See also S.L. Sporer, et al., Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 PSYCHOL. BULL. 315 (1995) (finding similar weak overall confidence-accuracy relationship, but also finding that the correlation was significantly higher for witnesses who positively identified a lineup member than those witnesses who gave a "none of the above" response).

One theoretical account for the weak relationship between witness confidence and accuracy suggests that accuracy and confidence are influenced (i.e., contaminated) by different post-event factors. Thus, accuracy may be influenced by factors such as misleading post-event information while confidence may be affected by factors such as biased testing instructions. More recent work, consistently with this proposition, has indicated that "eyewitness identification confidence appears to be malleable." Thus, witness confidence in a false identification—and consequently witness persuasiveness before a jury—can be enhanced, for example, by informing the witness that a co-witness identified the same suspect from a lineup.

Taken together, the foregoing propositions have serious implications for the criminal justice system. If, as the empirical evidence indicates, (a) eyewitness identification testimony is a singularly potent source of inculpatory evidence, (b) legal decision makers (prosecutors, jurors, and courts) in making credibility determinations look both to eyewitness confidence and to factors that rely heavily on "memory-based self-reports from the very eyewitnesses whose memory is being called into question," and (c) both witness confidence and witness memory are subject to contamination by post-event influences, then the use of contaminating identification procedures can be expected to contribute to erroneous convictions.

Research indicates that providing post-identification feedback to eyewitnesses is a form of contamination in both respects. As mentioned above, for example, giving an eyewitness feedback that a co-witness identified the same suspect inflates an eyewitness's confidence. Recent studies have also shown that post-identification feedback confirming the witness's selection can contaminate the witness's recollection not only of how

134. Michael R. Leippe, Effects of Integrative Memorial Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence, 4 LAW & HUM. BEHAV. 261 (1980).
135. Wells & Bradfield, supra note 131, at 361. For an overview of the issue of eyewitness confidence in lineup identifications, see Procedures, supra note 3, at 622-26.
137. See supra note 136 and accompanying text.
confident he or she was at the time but also other aspects of the witness's impressions of the eyewitnessing experience. For example, one study found that confirmatory post-identification feedback ("Good. You identified the actual suspect in the case.")

compared with the no-feedback control condition, yielded responses from the eyewitnesses indicating greater certainty in the identification, a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, a stronger basis for making the identification, greater willingness to testify, more trust in an identification made under these conditions, and more details provided in the description.

The size of the effect was striking. These results suggest that factors relied on by the legal system in assessing eyewitness identification evidence—the witness's actual recollection of

138. Wells & Bradfield, supra note 131, at 361. The authors explain their theoretical assumption that the witness's impressions of the witnessing experience—e.g., the Neil v. Biggers factors; the qualities of the identification task, such as how long it took and how difficult it was for the witness to make up his or her mind; and the witness's global impressions, such as his or her willingness to testify and the strength of the identification—largely consist of conclusions reached after the event rather than on-line memories recorded during the event. Under this model, a witness would be expected to be susceptible to influence from feedback because of the well-documented phenomenon of "hindsight bias":

Having no clear on-line memory for how confident they were at the time, confirming feedback should lead eyewitnesses to recall having been confident all along. Similarly, in the absence of an on-line impression of how good their view was, confirming feedback should lead eyewitnesses to make the inference that they 'must have' had a good view.

Id. at 362 (citing Baruch Fischhoff, Hindsight & Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, 1 J. EXPERIMENTAL PSYCHOL. 288 (1975)).

139. Wells & Bradfield, supra note 131, at 366. The experimental design in the study was set up to obtain a high false identification rate: The actual culprit was absent from the lineup, the lineup members closely resembled him, and the witness/participants were led to believe that the culprit was in the lineup and that their task was to identify him. In fact, there was a 100% false identification rate. Participants were randomly assigned (so that differences in their actual witnessing experience would tend to average out) to one of three groups: the confirming-feedback group, the no-feedback control group, and the disconfirming feedback group ("Actually, the suspect was Number ___"). Id. at 365.

140. Note that "the confirming feedback had a stronger impact in elevating certainty and other measures than the disconfirming feedback had in reducing the levels of these measures." Id. at 366. One possible explanation for this outcome is that the disconfirming feedback identified a different lineup member rather than informed the witness that the actual suspect was not present at all—which feedback would, because the witness likely did not consider such a possibility, probably have more drastically undermined the witness's faith in the quality of the witnessing experience.
both the witnessing and identification experience, as well as his or her confidence in the accuracy of the identification—can be dramatically distorted by even a single, relatively mild example of post-identification feedback.

Working from the assumption that witnesses do not think much about the quality of their witnessing or identification experience until asked to do so, and from evidence indicating that uninfluenced witnesses are able accurately to monitor and report on their decisional processes (e.g., whether the suspect’s photo “popped out” at them or whether they used a process of elimination, and the amount of time that the witness used in making the identification), researchers in another study also tested the impact of post-identification feedback when the witness is first asked to make a clear, uninfluenced statement at the time of identification of his or level of confidence. This study yielded several findings.

First, it replicated the effect of confirmatory feedback described above and extended it to contamination of witnesses’ recollection or impression of the identification strategy used (witnesses in the confirmatory-feedback condition were more likely to report that the suspect’s photo “just popped out at me”), the clarity of the culprit’s image in their memory, and, indicating a broad impact beyond the specific events, the witnesses’ general ability to recognize strangers’ faces. Second, asking witnesses to make a clear statement about their confidence before providing the witness feedback moderated the impact of subsequent feedback both on a second confidence question and on some aspects of their impression of the eyewitnessing and identification experience (including “their view, the basis for their identification, their willingness to testify, the trust they would place in such an identification by someone else”). The prophylactic effect of the confidence question was limited, however, and did not much dampen the impact of feedback on other aspects, including the witnesses’ reports of their ability to make out details of the culprit’s

141. See supra notes 96-97 and accompanying text (discussing differences between relative and absolute judgments).
142. Wells & Bradfield, supra note 131, at 368.
143. Id. at 370-72.
144. Id. at 372.
The ease with which they thought they made the identification, the amount of time they thought it took them to make the identification, the strategy they reported having used in making the identification, or their perception of how good they are at recognizing faces.\textsuperscript{145}

Third, the study found that simply asking specific questions about the eyewitness experience (e.g., "how well could you see the gunman?") did not moderate the effects of feedback at all—even with regard to witnesses' subsequent statements about the same specific issues (e.g., view).\textsuperscript{146}

The researchers concluded:

This work demonstrates that a casual comment from a lineup administrator following eyewitnesses' identification can sometimes have drastic effects on their reconstructions of the witnessing and identification experience. A confirming-feedback remark not only inflates eyewitnesses' recollection of how confident they were at the time, it also leads them to report that they had a better view of the culprit, that they could make out the details of the face, that they were able to easily and quickly pick him out of a lineup, that his face just "popped out" to them, that their memorial image of the gunman was particularly clear, and that they are adept at recognizing faces of strangers. These effects are very robust, with effect sizes that exceed what are normally considered large effects in psychology.\textsuperscript{147}

The practical implications of this research are profound. As suggested above, these findings indicate that the indicia relied on by jurors and courts to evaluate eyewitness credibility (witness confidence and witness impressions of the witnessing and identification procedures) can be dramatically enhanced by a single off-hand comment by an investigator even when the identification is false. As the researchers put it, "[i]n effect, the confirming-feedback manipulation served to manufacture credible witnesses from a pool of inaccurate witnesses who were not particularly credible on their own."\textsuperscript{148}

\textsuperscript{145} Id. at 373. Note that the duration of any prophylactic effect remains an issue for future research.

\textsuperscript{146} Id. at 374.

\textsuperscript{147} Wells & Bradfield, supra note 131, at 374.

\textsuperscript{148} Id.
These findings reinforce the recommendation, repeatedly advanced by researchers in this area, that eyewitness identification procedures should be conducted only by persons who are ignorant of which lineup member is the suspect.\footnote{149} In other words, because eyewitness evidence is so easily and so powerfully contaminated by confirmatory feedback, because other prophylactic measures (such as asking witnesses to make a clear statement of their confidence before any feedback is provided or asking questions about specific factors like view) are only partly or negligibly effective, and because the consequences of contamination are ironically to increase the likelihood that false evidence will be both admitted and credited, the argument for “double-blind” administration procedures becomes compelling. Use of “double-blind” procedures—which has long been standard practice in human-subject research—would preclude the possibility of contamination even from inadvertent or subtle feedback cues from the investigator.\footnote{150} In addition, the “double-blind” administrator should obtain a confidence statement from the witness at the time of the identification process (both to make a contemporaneous record and to help reduce the impact of post-identification information from whatever source).\footnote{151}

In summary, social science research has identified several areas of concern in interviewing eyewitnesses and in conducting eyewitness identification procedures. That research has also yielded recommendations to address those concerns. The fol-
lowing Part Three will summarize the Department of Justice’s *Guide* and discuss the extent to which it has profited from that work. As stated in the Introduction, although the *Guide* generally reflects an effort to improve the collection and handling of eyewitness evidence, it falls short in several critical respects.

### III. THE *GUIDE*

#### A. Introduction

The Department of Justice’s National Institute of Justice project that led to the *Guide*’s development was prompted by recognition of the risk and reality of false convictions.\(^\text{152}\) For the nation’s leading law enforcement agency in such circumstances openly to undertake a study of such basic evidence-gathering tools as eyewitness interviewing and identification poses a difficult dilemma. A conscientious and professional law enforcement agency would be dedicated to accuracy and presumably would be responsive to credible indications of systematic sources of error. Yet no realistic prosecutor or law enforcement official could ignore the potential difficulties posed by a study that arguably calls into question the validity of a large and important category of prosecutorial evidence. Law enforcement paradoxically could be made to look bad for trying to do better. Prosecution of the guilty could be impaired by efforts to improve accuracy and to protect the innocent. Any reform effort in the adversarial and polarized world of the criminal justice system is likely to be shaped by this dilemma. Adding to the difficulty is the need, in a project of national scope, for a product that is sufficiently generic to be useful across a diverse range of local considerations. The Department of Justice therefore is to be commended for having set sail at all in such shifting and uncertain waters, even if also subject to criticism for having failed to chart as bold a course as it might have done.

The *Guide*’s introductory materials reveal these tensions. While acknowledging the real risk and grave consequences of eyewitness error, the *Guide* nevertheless compliments the legal system’s responsiveness in having “designed and instituted special procedures to guard against eyewitness mistakes.” The

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152. *GUIDE*, *supra* note 12, at iii (noting the comments of Attorney General Reno).
Guide admits in the next breath that those procedures largely have failed to take adequate account of "the growing body of psychological knowledge regarding eyewitness evidence," while also making a point of claiming that the Guide itself does make use of social science research (either by adopting specific recommendations or at least by bringing them up for later consideration) and thereby will reduce the risk of erroneous identification. The Guide also seeks to negate any inference that its open acknowledgment of the occurrence of erroneous convictions and the continued use of procedures that contribute to such outcomes should cast doubt on the integrity of law enforcement: "[t]his Guide does not flow from the fear of misconduct [but] assumes good faith by law enforcement." And, perhaps to head off any challenges to the admissibility of eyewitness evidence not collected in conformity to its recommendations, the Guide reminds its readers that it is advisory only and "is not intended to state legal criteria for admissibility of evidence."

The Guide's introductory comments reflect an heroic effort to have it all ways at once. In effect, the Guide simultaneously acknowledges that standard law enforcement interviewing and identification procedures have played a substantial role in an alarming rate of false convictions, concludes that science-based procedures will significantly address the problem, and argues that the continued use of admittedly and demonstrably flawed procedures should have no impact on the legal status of the eyewitness evidence procured thereby. It remains to be seen, for example, whether courts will accept Justice's position that, while its new standards are necessary to "produce more reliable and accurate eyewitness evidence in a greater number," the use of practices that the Guide itself concedes "can undermine eyewitness reliability and accuracy" nevertheless should not affect that evidence's admissibility or at least its credibility. At the least, one can expect defense counsel to attempt to exploit failures by law enforcement to follow the Guide's recommendations.

153. Id. at 1-2.
154. Id. at 2.
155. Id. at 2.
156. Id. at 2.
B. The Guide's Recommendations

The Guide is organized into five sections, dealing with the initial contact with eyewitnesses, mug books and composites, follow-up interviewing, field identification ("showups"), and eyewitness identifications. For present purposes, these sections can be lumped into the two categories discussed above: (1) interviewing and (2) identification. Less than twenty-five pages long, the Guide's substantive portion is written in outline form, setting forth a governing principle and policy statement for the various aspects of each topic, followed by generic recommended procedures. The Department of Justice is currently working on training criteria to specify minimum levels of performance for each set of procedures.

1. Interviewing

With respect to the initial contact with eyewitnesses, the Guide makes several points related to the goals, described above, of obtaining sufficient information and avoiding contamination of the witnesses' memory trace. The Guide specifically instructs 911/emergency call-takers or dispatchers to "[a]sk open-ended questions (e.g. 'What can you tell me about the car?')," followed by more closed-ended questions "(e.g., 'What color was the car?')," to ask if there is "anything else," and to "[a]void asking suggestive or leading questions (e.g., 'Was the car red?')." The Guide reinforces the point by stating in summary, "[t]he manner in which facts are elicited from a caller can influence the accuracy of the information obtained." The Guide provides similar recommendations for the preliminary investigating officer, and adds additional points designed to reduce the risk of post-event contamination: separation of multiple witnesses and instructions to them to avoid discussing details of the event with other witnesses or potential witnesses and to avoid contact with the media or exposure to media coverage of the incident.

With respect to follow-up interviews, the Guide repeats the foregoing points and adopts a number of additional recommen-

158. Id. at 14.
159. Id. at 15-16.
dations that follow from the research reviewed above. Consis-
tently with some aspects of CI, for example, the Guide urges
interviewers to encourage witnesses to volunteer information, to
report all details of the event (even if seemingly trivial), to use
nonverbal communication (such as drawings, gestures, or ob-
jects), and to mentally recreate the event "(e.g., 'Think about
your feelings at the time')." The Guide also urges intervie-
wers to avoid volunteering specific information about the event, to
avoid interrupting witnesses, and to caution witnesses not to
guess. The Guide recommends documentation of the inter-
view, either through audio or video recording, stenographic re-
cording, witness statement, or a written summary using the wit-
nesses' own words (but does not express a preference for video
or audio recording of the interview). In addition, the Guide rec-
ommends that investigators encourage witnesses to contact them
if anything else about the event comes to mind and to also con-
duct follow-up interviews. Finally, the Guide recommends that
the investigator separately assess the accuracy of each element
of the witnesses' statement, compare each element to the entire
story (to look for inconsistencies), and compare each element to
other sources of information.

Although these recommendations address important issues
concerning the twin aims of maximizing retrieval and minimiz-
ing contamination, they miss several specific points and fail to
address the more systemic problems identified by Fisher. For
example, in its statements of principle or policy, the Guide does
not explicitly state the concepts underlying the components of
the cognitive interview, including the witness-centered control
of information. Other specific recommendations from CI are
either lacking or only obliquely referred to, such as inviting nar-
rative presentation, witness-compatible questioning (i.e., tailor-
ing questions to witnesses' mental representation of the event,
such as a witness who viewed the perpetrator from the side or
rear only), and the varied-retrieval method (e.g., having the wit-
ness recall the event in reverse chronological order). Two
specific recommendations related to avoidance of contamina-

160. Id. at 22-23.
161. Id. at 23.
162. GUIDE, supra note 12, at 24-25.
163. See supra notes 76-84 and accompanying text.
tion—double-blind interviewing and obtaining contemporaneous confidence statements—are not mentioned at all in connection with eyewitness interviewing.164

More generally, the Guide does not directly tackle the underlying systemic problems related to law enforcement training, assignment, and culture that can interfere with evidence collection and can sometimes contribute to evidence contamination.165 While it is understandable that a project sponsored by the Department of Justice would hesitate to take on such an ambitious and surely controversial reform effort, it is questionable whether the mere promulgation of the Guide's recommendations for interviewers will, by itself, have much practical impact on behavior. Adequate training, which requires performance-based (rather than rote) learning with opportunity for role-playing practice and feedback, will be essential. The literature indicates that previously acquired skills and attitudes among more experienced law enforcement personnel may be difficult to change even with dedicated training, much less through a mere outline of suggested procedures.166 Further, the literature suggests that any successful effort to reform a department's approach to eyewitness interviewing should, if possible, also take into account individual differences in aptitude and personality: not every officer is equally suited for the task of effective witness interviewing, just as not every officer is cut out for assignment to the department's tactical unit. It is to be hoped that the forthcoming training criteria will address these issues.

2. Identification

The Guide's recommendations concerning identification techniques address several important issues related to instruction and foil biases, but not response bias. More importantly, the Guide fails to adequately address either the underlying problem of relative judgment or the issue of contamination.

With respect to mug books, the Guide states that nonsuggestive procedures should be used, such as grouping photos by format; selecting photos that are uniform with respect to

164. The Guide does address the issue of confidence statements in connection with eyewitness identification. See infra note 186 and accompanying text.
165. See supra note 85 and accompanying text.
166. Fisher, supra note 44, at 757.
physical characteristics such as race, age, and gender; and including only one photo of each individual.\textsuperscript{167} The Guide also offers instructions to promote context-based recall (asking the witness to “think back to the event and his/her frame of mind at the time”), to reduce bias (“that the person who committed the crime may or may not be present in the mug book” and that the police will continue to investigate regardless of whether the witness makes an identification), and to elicit a statement from the witness of how he or she knows the person selected and how certain he or she is of the identification.\textsuperscript{168} Although the Guide recognizes that “documentation of the procedure and its outcomes improves the strength and credibility of the results obtained from the witness,” it stops short of recommending videotaping of the procedure and instead opts for a written record only.\textsuperscript{169} Notably missing from the Guide is any recognition of the potential biasing impact of mugshot viewing on later identification tasks.\textsuperscript{170}

Recognizing their inherent suggestiveness, the Guide recommends that use of showups (displaying a single suspect to a witness) be minimized and offers suggestions to reduce the adverse impact. This recommendation is but a faint echo of the “grave concerns” expressed about showups in the APLS Scientific Review Paper, which counsels against using the technique at all.\textsuperscript{171} The Guide recommends that investigators: first obtain and document a description of the perpetrator before conducting the showup; second, separate multiple witnesses and, if one witness makes a positive identification, consider using other less

\textsuperscript{167} Guide, supra note 12, at 17.

\textsuperscript{168} Id. at 17-20. Recommendations concerning development and use of composites include contamination-avoidance measures such as conducting the procedure with each witness separately.

\textsuperscript{169} Id. at 20.

\textsuperscript{170} For example, research indicates “that persons appearing in lineup parades who have appeared in prior photoarrays or mugshots may even be identified at a rate similar to the rate at which the actual target is identified!” Cutler & Penrod, supra note 36, at 107. Other research has found that “[s]ubjects tended to remain committed to their decisions. False identifications from mugshots led to false identifications from photoarrays, whereas rejections of the mugshots tended to lead to incorrect rejections of the photoarrays.” Id. at 108.

\textsuperscript{171} Procedures, supra note 3, at 630-31. The authors note that “there is clear evidence that show-ups are more likely to yield false identifications than are properly constructed lineups.” Id. at 631.
suggestive procedures; third, use non-biased instructions (that
the individual shown to the witness may or may not be the per-
petrator); and finally, obtain and document a statement of the
witnesses’ level of certainty for both identifications and non-
identifications.172 The Guide also recommends documentation
of the procedure, including any identification or non-
identification made by the witness.173 Again, however, all
documentation recommendations are limited to written docu-
mentation only.

The remainder of the substantive portion of the Guide is
taken up with lineups (both photo and live). The Guide states
that “[t]he investigator shall compose the lineup in such a man-
ner that the suspect does not unduly stand out.”174 The Guide
offers several recommendations that are intended to reduce in-
struction and foil biases. But the Guide does not address at all
the problem of response bias; there are no recommendations for
“blank” lineups.

The Guide is the most faithful to research findings in its
recommendations to avoid instruction bias. The stated policy is
“ensure the witness understands that the purpose of the identifi-
cation procedure is to exculpate the innocent as well as to iden-
tify the actual perpetrator.”175 The Guide specifically urges in-
vestigators to tell witnesses that “it is just as important to clear
innocent persons from suspicion as to identify guilty parties,”
and to give the critical instruction that “the person who com-
mitted the crime may or may not” be in the lineup.176 And, to
reassure witnesses who might otherwise be hesitant to give a
“none-of-the-above” response, investigators are urged to
“[a]ssure the witness that regardless of whether an identification
is made, the police will continue to investigate the incident.”177
Also, to reduce the likelihood that the culprit can evade identifi-
cation by altering superficial aspects of his appearance, the
Guide suggests reminding witnesses that the individuals de-
picted in the lineup may not appear exactly as they did at the

173. Id. at 28.
174. Id. at 29.
175. Id. at 31.
176. Id. at 32.
177. GUIDE, supra note 12, at 32.
time of the incident because some features (e.g., head and facial hair), are subject to alteration.\textsuperscript{178}

With respect to lineup composition, the \textit{Guide} first urges investigators to include only one suspect in each lineup. This recommendation may strike naive readers as so obvious as to be unnecessary, but police do conduct multiple-suspect, and sometimes even all-suspect, lineups (even in single-culprit cases). The result of such practices is to reduce or even preclude the possibility that investigators will detect false identifications.\textsuperscript{179}

The \textit{Guide}'s other recommendations concerning foil bias, so far as they go, largely track the general match-to-description and special-circumstances conclusions from the research discussed above. The \textit{Guide} urges selection of fillers who generally fit the witness's description of the perpetrator but who are not so uniform as to make identification difficult. The \textit{Guide} further suggests that, when the suspect's appearance differs from the witness's description of the perpetrator, fillers should resemble the suspect with respect to salient features. The \textit{Guide} also suggests creation of a consistent appearance between fillers and suspect with respect to unique features (e.g., tattoos or scars) either by covering or artificially creating those features. And the \textit{Guide} urges that investigators avoid reusing fillers when showing a new suspect to the same witness.\textsuperscript{180} The \textit{Guide} recommends a minimum of four fillers for live lineups and five fillers for photo arrays. With respect to behavioral cues, the \textit{Guide} reminds investigators to make sure that any identification actions (such as speaking or moving) are performed by all lineup members.\textsuperscript{181}

The \textit{Guide}'s foil recommendations omit several important points. For one thing, they leave out the researchers' recommendation concerning separate lineups for multiple witnesses.\textsuperscript{182}

\begin{itemize}
  \item \textsuperscript{178} Id.
  \item \textsuperscript{179} \textit{Successful Application}, supra note 11.
  \item \textsuperscript{180} \textit{GUIDE}, supra note 12, at 29-31. The \textit{Guide} also addresses the issue of placement. For photo lineups, the \textit{Guide} recommends random placement. For live lineups, where the suspect's counsel might be present and "where local practice permits," the \textit{Guide} suggests that counsel or the suspect be allowed to request a specific placement; otherwise, the \textit{Guide}'s default recommendation is random placement. \textit{Id.} at 30.
  \item \textsuperscript{181} Id. at 35.
  \item \textsuperscript{182} See \textit{supra} notes 117-18 and accompanying text (discussing problem of correlated error).
\end{itemize}
Instead, the Guide merely suggests altering the placement of the suspect—a manipulation that fails fully to address the problem of correlated error. Another problem is that the Guide's control procedures on foil bias are inadequate. Rather than the rigorous "mock witness" procedure recommended by researchers, the Guide opts instead for a "quick-and-dirty" approach (and only for photo-spreads at that) by urging investigators to "[v]iew the spread, once completed, to ensure that the suspect does not unduly stand out."\textsuperscript{183} And, while practical considerations obviously constrain lineup size, the minimum photo and live lineup sizes recommended by the Guide yield false-identification probabilities that are, in the APLS Scientific Review Paper's view, "far higher than what would seem acceptable to the justice system."\textsuperscript{184}

The Guide does not ignore the contamination problem discussed above, but it fails to endorse the most effective remedy—double-blind administration procedures. The Guide offers four means to address the problem. First, it urges investigators to obtain post-identification confidence statements at both photo-spreads and live lineups. Before administering the lineup, investigators are advised to "[i]nstruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification."\textsuperscript{185} After administering the lineup, the investigator is urged to document the identification results and witness's "statement of certainty."\textsuperscript{186} Second, investigators are warned in two ways not to provide incriminating information to the witness. One way (for photo-spreads) is to "[e]nsure that no writings or information concerning previous arrest(s) will be visible to the witness."\textsuperscript{187} Another is generally to "[a]void saying anything to the witness that may influence the witness' selection."\textsuperscript{188} Third, investigators are advised to avoid feedback: "[i]f an identifica-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{183} GUIDE, supra note 12, at 30.
\item\textsuperscript{184} Procedures, supra note 3, at 635. According to the estimates relied upon in Procedures, the minimum photo and live lineup sizes recommended by the Guide yield false-identification probabilities of 10 and 12 percent, respectively (assuming, as the Guide itself recommends, only a single suspect in each identification procedure). See supra note 181.
\item\textsuperscript{185} GUIDE, supra note 12, at 32.
\item\textsuperscript{186} Id. at 33.
\item\textsuperscript{187} Id. at 30.
\item\textsuperscript{188} Id. at 33, 34.
\end{enumerate}
\end{footnotesize}
tion is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty."189 Fourth, investigators are reminded to instruct the witness not to discuss the results of the identification procedure with other witnesses and to avoid contact with the media.190 The Guide recommends documentation of the lineup procedures, but again expresses no preference for the documentation most likely to reveal sources of bias or contamination—videotaping.

These procedures, if followed scrupulously (a condition rendered difficult to verify in the absence of a videotape record or non-police observer), might reduce the risk of contamination somewhat.191 But there are subtle and perhaps unintentional ways to communicate the forbidden information to the witness before, during, or after the identification.192 The best way to avoid the serious problem of contamination, in addition to the procedures set forth in the Guide, is to have the lineup administered by someone who lacks potentially contaminating knowledge himself or herself—i.e., through a double-blind procedure. One cannot disclose, even inadvertently, what one does not know.

Finally, the Guide apparently misses the point concerning the relative judgment process and presentation bias. First, as mentioned above, although the Guide offers sequential presentation procedures as an alternative, it fails to recommend sequential over simultaneous procedures. The Guide expressly acknowledges that "scientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially—one at a time—rather than simultaneously."193 The Guide nevertheless refuses to express a preference for sequential procedures for the stated reason that, "[a]lthough some police agencies currently use sequential methods of presentation, there is not a consensus on any

189. Id. at 33, 35.
190. GUIDE, supra note 12, at 35, 37.
191. See supra notes 142-51 and accompanying text.
192. For discussion of how this can happen, see supra notes 48-71, 126-40 and accompanying text.
193. GUIDE, supra note 12, at 9.
particular method or methods of sequential presentation that can be recommended as a preferred procedure . . . ” 194 With all due respect to the Department of Justice, this reasoning is difficult to follow. It is hard to see why a lack of consensus among law enforcement about how to conduct sequential procedures precludes the Guide from recommending a preference for them; moreover, the same literature that demonstrates their lower false-identification rate also amply describes how to conduct them. In any event, the relevance of a lack of consensus on this issue among law enforcement agencies—of which only a small minority use sequential procedures 195—is far from clear. Progress will be slow in coming indeed if the Guide (the noun literally meaning one who “leads or directs another in his way or course”196) awaits leadership from behind.

Second, the Guide compounds the problem by including alternative sequential-presentation procedures that undermine the entire point of using them. For both photo and live sequential lineups, the Guide’s suggested viewing instructions include the following: “All [photos/individuals] will be shown, even if an identification is made; or the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).” 197 Thus, not only does the Guide fail to state a preference for the presentation procedure that the Guide itself acknowledges is more accurate, the Guide further fails to express a preference for conducting that procedure in the way that is consistent with the theoretical reason for its greater accuracy. In other words, the sequential presentation procedure reduces the risk of false identification in culprit-absent lineups because it forces the witness to use an absolute judgment process rather than a relative judgment process. 198 By including instructions contemplating that all photos or individu-

194. Id.
197. GUIDE, supra note 12, at 34, 37.
198. See supra notes 96-97 and accompanying text (discussing relative versus absolute judgment processes).
als will be shown even if an identification is made, the Guide implicitly endorses a sequential procedure that invites relative judgments. If this is the point on which there is a lack of consensus in the law enforcement community, then the Guide's failure to provide leadership is even more baffling given the clarity with which this specific issue is addressed in the literature. 199

In fairness to Justice's efforts, it must be pointed out that the APLS Scientific Review Paper also stopped short of including sequential presentation among its recommendations. Its reasoning, however, was somewhat different and offers scant justification for the Guide's omissions. First, the Scientific Review Paper predicts that its recommendations concerning double-blind procedures, non-biased instructions, non-biased lineup composition, and obtaining confidence statements would go far in addressing the bulk of the problem. Sequential procedures' superior validity emerges most clearly when foil and instruction biases are present. 200 Although the Guide addresses some of the problems related to instruction and foil bias, one of the key ingredients in the Scientific Review Paper—double-blind procedures—is completely lacking from the Guide.

Second, the authors hesitated to recommend sequential procedures out of concern that implementing them without double-blind safeguards could be even more prone to influence by investigators because of the ease with which an eyewitness could be influenced to identify a singly presented suspect. The Guide in a sense presents the worst of both worlds by recommending sequential procedures that fail to address the relative judgment problem while also failing to provide at all for the critical safeguard of double-blind procedures.

Third, the paper frankly—and perspicaciously, as it turned out—acknowledges that legal policy makers might have difficulty grasping the underlying theoretical concepts and accepting unfamiliar practices. 201 But, as described above, the purported purpose of the Guide was to bridge that very gap by recom-

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199. See supra notes 96-125 and accompanying text.
201. See id.
mending the integration of scientifically valid principles and routine law enforcement practices.\textsuperscript{202}

The Scientific Review Paper, while strongly encouraging videotaping of lineups, like the \textit{Guide} also declined to endorse a videotaping requirement. For one thing, unlike the Paper's other recommendations, videotaping requires additional investment in equipment and personnel. Next, videotaping would at best merely record the lineup, not remedy the factors that contribute to false identifications. Another problem is that, to be useful, a video record would have to include not just the lineup itself, but also the witnesses' and investigators' actions; and all three perspectives would also have to be synchronized. And, as psychologists familiar with the principles of standardized testing recognize, the possible influence on witnesses of the videotaping procedure itself would need to be studied empirically. Finally, the Paper's authors were concerned that reliance on videotaping would shift emphasis away from error-prevention through implementation of more accurate procedures to error-catching through better documentation.\textsuperscript{203} Keep in mind, however, that the Position Paper assumed that its other recommendations would be adopted. As with sequential procedures, the Guide's failure to express a preference for videotaping combines with the absence of a recommendation for double-blind procedures to leave open a substantial opportunity for continued error: the risk of contaminated identification procedures will not be controlled by the most effective method (i.e., double-blind procedures) and the occurrence of subtle contamination probably will not be documented.

IV. THE GUIDE'S SHORTCOMINGS ARE BOTH UNFORTUNATE AND UNNECESSARY

A. Unfortunate

Both archival and experimental data indicate that "mistaken identifications appear to be the most frequent source of erroneous convictions" and that the risk of error is more than negligible.\textsuperscript{204} In each case, the criminal litigation process failed to de-

\textsuperscript{202} See supra notes 14-16 and accompanying text.
\textsuperscript{203} Procedures, supra note 3, at 640-41.
\textsuperscript{204} Devenport, supra note 195, at 338; see supra notes 5-7 and accompanying text.
tect and correct an error made at the investigation phase. The mounting evidence of these failures demonstrates that it would be irresponsible for law enforcement to continue to rely on methods of collecting and handling eyewitness evidence that involve demonstrably high and preventable risks of error.

There are several reasons why the criminal litigation process is an unreliable source of error-detection and -correction. Most generally, the usual measures relied on in that process—such as the presence of counsel during lineups, voir dire, motions to suppress suspect identifications, cross-examination of witnesses, argument and instruction to the jury, and post-conviction review—all rely in the first instance on the adversarial system. That is, the innocent defendant obviously must depend on his lawyer’s zeal and competence in pursuing any particular litigation measure. Society’s commitment to providing adequate representation to indigent defendants has not kept pace, however, with its enthusiasm for criminal convictions. This gap has received the greatest attention in the context of the death penalty, where it has been noted that “[t]he single greatest problem with our system of capital punishment is the quality of representation afforded capital defendants.”

There are other, more specific reasons why litigation safeguards are inadequate to the task of catching and correcting eyewitness error. According to one recent review, “research on the effectiveness of legal safeguards is not very encouraging.” Those authors note, for example, that

The presence-of-counsel safeguard is of questionable effectiveness because attorneys are rarely present at identification tests, and, when the are, they do not fully understand the factors that affect suggestiveness. Voir dire is unlikely to be effective because characteristics identifiable before trial, such as attitudes toward eyewitnesses, do not predict juror bias. Cross-examination appears to be ineffective because jurors tend to rely on factors that do not predict identification accuracy and ignore factors that do affect accu-


206. Veronica Stinson et al., How Effective is the Motion-to-Suppress Safeguard? Judges’ Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures, 82 J. APP. PSYCHOL. 211, 211 (1997) [hereinafter Judges’ Perceptions].
racy. Expert testimony has shown some success at sensitizing jurors to factors affecting eyewitness memory, but is usually ruled inadmissible. Traditional judges’ instructions about eyewitness memory do not sensitize jurors effectively, but there is some evidence that revised instructions can assist jurors.\(^{207}\)

In other words, the adequacy of legal safeguards depends largely on the extent to which decision makers in the process are sensitive to the specific factors affecting the validity of eyewitness evidence. A comprehensive review of the literature in this area by Devenport and colleagues reveals “worrisome” gaps between what science has found, on the one hand, and attorneys’, judges’, and jurors’ intuitive or “commonsense” assumptions about the evaluation of eyewitness evidence on the other hand.\(^{208}\) With respect to attorneys, the literature indicates that they “have commonsense knowledge about such factors as race, stress/violence, lighting, viewing conditions, foil bias, and instruction bias but may lack scientific knowledge regarding other factors that influence eyewitness identification accuracy, such as eyewitness confidence and presentation bias.”\(^{209}\)

The effectiveness of a motion to suppress will largely be determined by attorney and judicial sensitivity to factors affecting the validity of eyewitness identifications, and by attorneys’ perceptions of judicial attitudes. In other words, for the motion-to-suppress safeguard to be effective, attorneys must recognize the relevant biases, make a determination about the likely success of a motion to suppress, and actually persuade the judge to grant the motion. In a recent simulation study, investigators found overall that judges were more likely to grant a motion to suppress identification evidence and to rate the lineup as unfair

\(^{207}\) Id. (citations omitted). See also Procedures, supra note 3, at 608–09 (similarly noting that legal safeguards fail to provide adequate protection against mistaken identification).

\(^{208}\) Devenport, supra note 195, at 340.

when the foil or the instructions were biased (and each bias had an even stronger effect when the other bias was also high). Judges in the study did not, however, indicate sensitivity to presentation bias. To the contrary, they tended to perceive sequential presentation as less fair than simultaneous presentation—largely for the reason that sequential presentation prevented witnesses from comparing lineup members. In other words, judges displayed not only insensitivity to presentation bias, but also an intuitive but erroneous preference for the relative judgment process.

A related study of attorneys’ reactions to the same simulation materials revealed that they too recognized both foil and instruction bias but not presentation bias. Like the judges, attorneys believed that sequential lineups were more suggestive. Lawyers accurately predicted that judges would be more likely to suppress identification evidence from foil-biased lineups but incorrectly assumed that judges would be insensitive to instruction bias. Both attorneys and judges (consistent with the scientific literature) tended to believe that juries would not be effective in recognizing instruction bias, while most attorneys (contrary to available scientific literature) believed that the jury’s assessment about identification accuracy would be influenced by foil bias. And, notably, not only did attorneys erroneously believe that sequential lineups were more suggestive, they also believed that they could convince juries to share that misconception.

The authors concluded that “data from attorneys and judges support the view that foil and instruction biases are potentially correctable by the motion-to-suppress safeguard. These data also suggest that presentation bias may not be correctable by the presence-of-counsel and motion-to-suppress safeguards.”

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211. Id. at 217.
212. Attorneys’ Perceptions, supra note 209, at 72.
213. Id.
214. See Judges’ Perceptions, supra note 206, at 216-17, for discussion of the relationship between the two studies.
215. Id. (citing Brian Cutler et al., Expert Testimony and Jury Decision Making: An Empirical Analysis, 7 Behav. Sciences & L. 215 (1989)).
216. Attorneys’ Perceptions, supra note 209, at 72.
should be noted that some judges in the study, albeit a minority, would have denied the motion to suppress and allowed the jury to resolve the problem of lineup suggestiveness.\textsuperscript{218} Also, the conclusion that both safeguards are effective with respect to instruction bias must be tempered by the evidence that lawyers are skeptical about judicial sensitivity to instruction bias. Finally, it is also worth noting that, to the extent that lawyers’ and judges’ opposition to sequential presentation was based on, in addition to simple unfamiliarity with the technique and likely ignorance about the literature regarding relative versus absolute judgment processes, a commonsense and probably correct suspicion that investigators could more easily influence the witness to choose a singly-presented suspect, that problem could be remedied by the double-blind procedure advocated in the literature.\textsuperscript{219}

If, as the evidence indicates will at times be the case, attorneys either do not make or do not prevail on a motion to suppress possibly biased eyewitness evidence, then it will be left for the jury—aided perhaps by cross-examination, expert testimony, or closing argument—to evaluate the credibility of the eyewitness evidence. Devenport and colleagues reviewed studies taking a variety of approaches to assessing jurors’ beliefs and assumptions, including surveys, “postdiction” studies (in which jurors are asked to postdict the outcome of a previously conducted identification procedure), and mock trials. Overall, results yield little basis for confidence that jurors provide a reliable bulwark against erroneous convictions based on false eyewitness evidence.

Surveys showed some juror sensitivity to factors affecting the accuracy of eyewitness evidence, such as cross-race recognition and prior administration of photo-arrays, but relative insensitivity to other factors such as the effects of eyewitness age and retention interval; and jurors believed (contrary to scientific studies) that training improves a witness’s identification accuracy.\textsuperscript{220} Results of postdiction studies showed that jurors “often predict higher identification accuracy rates than are generally found among participants of eyewitness research;” “appeared to be insensitive to the influence of crime seriousness, instruction

\textsuperscript{218} Id. at 219.
\textsuperscript{219} Id. at 218.
\textsuperscript{220} Devenport, \textit{supra} note 195, at 346.
bias, and the impact of cross-racial identifications on eyewitness identification accuracy;" and appear to place too much emphasis on eyewitness confidence." Simulation studies "converge on rather dismaying conclusions about jurors' abilities and indicate that jurors (a) overestimate the accuracy of identifications, (b) fail to distinguish accurate from inaccurate eyewitnesses, and (c) base their decisions in part on witness confidence—which tends to be a poor predictor of identification accuracy." Overall, Devenport and her colleagues concluded that findings from all three approaches "consistently revealed that jurors tend to rely on factors that are not diagnostic of eyewitness accuracy, such as eyewitness's memory for peripheral details and eyewitness confidence, tend to overestimate eyewitness accuracy, and have difficulty applying their commonsense knowledge of lineup suggestiveness to their verdict decisions."

Leippe's analysis and review concluded that "[f]or a number of reasons, including data from empirical studies, cross-examination, opening and closing arguments, and judge's instructions cannot be relied on to counter mistaken eyewitness identifications." According to the Scientific Review Paper's review of the literature, "[c]ross-examination, a marvelous tool for helping jurors discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken." One problem with cross-examination, Leippe noted, is that it tends to target, shape, and make "salient exactly what can most mislead jurors: eyewitness confidence." Although witness confidence can be undermined by cross-examination, fact-finders' ability to detect eyewitness error is not necessarily thereby enhanced; and, in any event, pretrial briefing of witnesses often bolsters their confidence against such assaults. A lawyer's success at using cross-examination or summation to illuminate more accuracy-relevant factors will of course depend on the lawyer's sensitivity to the correct factors,
which, as discussed above, is far from assured.\textsuperscript{227} There is also some evidence that judges’ instructions “do not effectively teach jurors about how to evaluate eyewitness testimony.”\textsuperscript{228}

Of course, one way to address the problem of juror misconceptions about human memory and eyewitness evidence is to proffer expert witnesses to provide scientifically based information on those topics. Such testimony does not specifically refer to any particular witness, but instead is a form of what has been referred to as “social framework testimony” which provides “‘general conclusions from social science research’ as a means of helping a jury ‘in determining factual issues in a specific case.’”\textsuperscript{229} For several reasons, eyewitness expert testimony—a measure aimed at enhancing the error-detection and -correction capacity of the trier of fact—is unlikely to provide an adequate substitute for measures that reduce the risk of error in the first place, at the investigation stage. For one thing, although some courts do admit such testimony, and a few have ruled that in some circumstances it can be an abuse of discretion to exclude it when eyewitness identification is the central issue,\textsuperscript{230} acceptance is far from universal.\textsuperscript{231} But even if such testimony is admitted into evidence, there is reason to doubt whether it will fully rem-

\textsuperscript{227} Id. at 923-24. See supra notes 208-16 and accompanying text.
\textsuperscript{228} Lieppe, supra note 224, at 924 (citing Brian Cutler, et al., Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence, 20 J. APPLIED PSYCHOL. 1197 (1990)).
\textsuperscript{229} Lieppe, supra note 224, at 910 (quoting John Monahan & L. Walker, Social Science Research in Law: A New Paradigm, 43 AMER. PSYCHOL. 465 (1988)).
\textsuperscript{231} E.g., Connecticut v. McClendon, 730 A.2d 1107, 1114-17 (Conn. 1999) (ruling that trial court did not abuse its discretion in excluding eyewitness expert testimony because content of such testimony was within general knowledge of jurors); Kansas v. Gaines, 926 P.2d 641, 646-49 (Kan. 1996) (“expert testimony regarding eyewitness identification should not be admitted into trial;” issue of eyewitness reliability is better addressed through cautionary instructions to jury); United States v. Daniels, 64 F.3d 311, 315 (7th Cir. 1995), cert. denied, 516 U.S. 1063 (1996) (eyewitness expert testimony properly excluded because it does not aid jury in understanding facts). For reviews of the issue, see generally Robert P. Murrian, The Admissibility of Expert Eyewitness Testimony Under the Federal Rules, 29 CUMB. L. REV. 579 (1999); Robert J. Hallisey, Experts on Eyewitness Testimony in Court—A Short Historical Perspective, 39 HOW. L.J. 237 (1995). For a forceful argument in favor of admissibility, see Leippe, supra note 224, at 913-52.
edy the problems associated with lineups. According to the re-
view of the literature by Devenport and colleagues:

Overall, the research examining the expert testimony safe-
guard suggests that the presentation of scientific knowledge
in the form of expert psychological testimony may enhance
juror sensitivity to factors that influence eyewitness identi-
fication performance such as violence, eyewitness confi-
dence, and other factors present during witnessing and
identification conditions. *It does not, however, appear to
enhance juror commonsense knowledge of factors influ-
encing lineup suggestiveness.*

In summary, then, the picture is this: there are well-
documented sources of preventable error in eyewitness evi-
dence. The perpetuation of such errors has led, and will doubt-
less continue to lead, to the conviction of individuals for crimes
they did not commit. Every false conviction works a double in-
justice: in addition to inflicting a wrong on the falsely con-
victed, it also allows the actual perpetrator to go unpunished. A
large body of valid social science research has described some
of the most important sources of error, has demonstrated that
litigation remedies are inadequate, and has suggested means to
remedy those sources of error without compromising the rate of
"true positive" identifications. The Department of Justice’s
*Guide*, while acknowledging the scope of the problem and the
validity of the social science concerning eyewitness evidence,
has recommended procedures that only partially address the
problem and that leave in place substantial sources of error—
particularly those associated with investigator and presentation
biases.

**B. Unnecessary**

How to account for the *Guide*’s omissions? The most satis-
fying explanation would have been that the social science was
flawed in critical respects and that the *Guide* was merely being
selective. But, as the *Guide* itself acknowledges, this is simply
not the case. 233 One might also wonder whether the Working
Group merely overlooked the relevant scientific literature. But

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the *Guide* specifically mentions both the sequential presentation and double-blind safeguards and, in any event, leading researchers in this area, including Drs. Gary Wells, Ronald Fisher, Solomon Fulero, Rod Lindsay, Roy Malpass, and John Turtle were on either the Planning Panel or the Working Group.\(^{234}\) Thus, the Department of Justice’s National Institute of Justice apparently made a deliberate and informed choice not to include in its recommendations measures that admittedly valid research had shown would be likely to reduce important sources of error.

This curious result is probably best understood in political rather than scientific terms as a partial failure of the various constituencies represented on the Planning Panel and the Working Group to reconcile their fundamental differences in world view. For one thing, the Planning Panel and Working Group were dominated by representatives from prosecutors and law enforcement, who together comprised sixty-eight percent of the total.\(^{235}\) Researchers, by contrast, comprised twenty percent, with defense counsel making up the remaining twelve percent.\(^{236}\) Given law enforcement’s (including prosecutors’) innate conservatism, resistance to change, desire for control, and suspiciousness of outsiders—often adaptive tendencies among those charged with maintaining order and enforcing the status quo within the parameters of an adversarial legal system—it is perhaps more surprising that the *Guide* goes as far as it does in recommending science-based reform. According to one of the defense bar’s representatives on the Planning Panel, one reason “for law enforcement (particularly prosecutorial) resistance was the fear that in the interim between announcing ideal procedures and investigators actually putting those procedures into routine practice, defense lawyers will use the ideal procedures to beat up police still using current procedures and free the guilty.”\(^{237}\)

For their part, Working Group prosecutors in particular expressed skepticism about new and unfamiliar methods, a preference for

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\(^{234}\) *GUIDE*, *supra* note 12, at v-vi.

\(^{235}\) *Id.* at 6.

\(^{236}\) *Id.*

traditional ways of doing things, and resistance to sequential and double-blind procedures.\(^{238}\)

In a related vein, it is likely that prosecutors' receptivity to input from social science has been adversely impacted by the controversy surrounding eyewitness expert testimony. Prosecutors, fearing that such testimony promotes juror skepticism about such an important source of inculpatory evidence, have strenuously resisted its admissibility: in that struggle, "[t]he point for defense lawyers was that you shouldn't believe eyewitnesses; the point for prosecutors was that you should."\(^{239}\) The adversarial system's concomitant partisanship has left prosecutors generally wary of social science involving eyewitness memory and reporting. This posture, while understandable, is misplaced. Whatever the respective merits of the various sides in the controversy about eyewitness expert testimony, the Guide's focus is on the investigation, not the litigation, stage of the process. Application of the principles discussed in this article would help to serve rather than to frustrate the goals of identifying and prosecuting the guilty while protecting and exonerating the innocent. Prosecutors, unlike defense counsel, owe two sets of duties—one to justice and the other to the zealous advocacy of the government's case.\(^{240}\) In theory at least, it is not until the prosecutor has formed a belief in his or her own mind about the suspect/defendant's guilt, and events move toward the litigation phase, that the advocacy role comes to the fore. The problem is that the basis for prosecutorial belief about guilt should be the evidence adduced through investigation—which is the process that social science has shown is susceptible to error resulting from some of the procedures that prosecutors and law enforcement have resisted changing. The advocate's resistance to an entirely different issue (eyewitness expert testimony) really

\(^{238}\) Successful Application, supra note 11.

\(^{239}\) Doyle, supra note 237, at 495. According to Devenport and colleagues, "Juror skepticism refers to a tendency to doubt or disbelieve an eyewitness's testimony, whereas juror sensitivity refers to both a general awareness or knowledge regarding the factors that influence eyewitness memory and an ability to use the information accordingly when rendering a verdict." Devenport, supra note 195, at 354. There is data indicating that eyewitness expert testimony does indeed increase juror skepticism. Id. at 354-55.

\(^{240}\) E.g., MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8 cmt. (1999) ("A prosecutor has the responsibility of a minister of justice and not simply of an advocate. This responsibility carries with it specific obligations to see that . . . guilt is decided on the basis of sufficient evidence.").
has little place in a context (investigations) in which the truth-seeking role should be foremost.

More generally, these tensions are related to what Professor Tanford has referred to as the different "normative structure" of psychology, on the one hand, and the trial system, on the other. Psychology's "organizing principle," he explains, "is the pursuit of truth. In addition, psychology values universality, community, disinterestedness, skepticism, and progressiveness." The "basic organizing principle" of the trial system, by contrast is "its adversarial structure. There are lawyers on each side of a case, who are charged, not with assisting in the determination of the truth, but with advancing their clients' individual interests, regardless of the merits."

The trial system also values other goals. One is efficiency, manifest for example in the conservation of limited trial resources and the commitment to finality. Psychology does not share this view; instead, it tends to regard conclusions as tentative and subject to further challenge. Replication of experiments, a key aspect of the scientific process, is the antithesis of finality. Next, while the two systems both value "truth," they mean different things by that term. The trial system's conception of "truth" emerges out of a greater pressure for a particular, usually binary result in an environment of considerable uncertainty. It is in this sense that courts can speak, for example, of a distinction between "legal innocence" and "actual innocence." Psychology looks for generalizable, consistent conclusions from data that are as complete and as controlled as possible. Finally, the trial system serves two additional goals that are not shared by empirical psychology: One is a commitment to the reinforcement of social institutions and behavioral norms by setting an example of respect for democratic ideals. The other is the preservation of social order by legitimating the exercise of

242. *Id.* at 157-58.
243. *Id.* at 159.
244. *Id.* at 160-61.
246. Tanford, supra note 241, at 163-64.
the state's coercive power and monopoly on violence against its citizens.\footnote{Id. at 165.}

The normative structure of the investigation phase—especially as it relates to the construct of "truth"—lies in some middle region between those two disparate world views. To be sure, investigations must take account of some aspects of the trial system's value structure, including the concern with efficiency and practicality in a world of uncertainty. The investigation will also be under pressure to come to some eventual conclusion. Moreover, no rational investigator can operate effectively without awareness that his or her work will be subject to challenge by partisans in an adversarial process whose commitment is to winning rather than to truth. But the investigation phase is the process through which the government determines whether to prosecute; hence, it is the means for defining what the government's position will be in the trial phase. In reaching that decision, some measure of science's conception of truth-seeking—including through maintenance of some degree of skepticism and disinterestedness—is necessary if the criminal trial is to have a sufficient level of reliability to sustain the claims to legitimacy upon which its own normative structure rests. In other words, while trials and investigations both reflect a compromise resulting from a variety of goals and values not necessarily shared by social science, some minimal level of accuracy is surely essential to accomplishment of at least some of those goals; and social science can help investigators enhance their level of accuracy.

It is in this regard that researchers have urged investigators to take a step closer to social science methodology when conducting eyewitness identification procedures. The literature has drawn an analogy between lineups and a social science experiment, which involves hypothesis testing through means that seek to reduce likely threats to the validity of its findings, known as "confounds."\footnote{Procedures, supra note 3, at 617-19.} Similarly, an investigator in a sense approaches the lineup with an hypothesis (the suspect is the culprit), which he or she then tests by administering a procedure (the lineup) to one or more subjects (the witness or witnesses). Likely confounds—such as an investigator's confirmatory bias (e.g., fo-
cusing questions on the suspect, but not the foils), "demand characteristics" (e.g., at best influencing the eyewitness to choose one of the lineup members and at worst to choose the suspect), lack of control groups (e.g., not running blank lineups), and selective acceptance of data (concentrating on identifications and ignoring none-of-the-above responses)—can be controlled through use of the procedures recommended by researchers.

Although the investigative function of course will never be entirely divorced from the prosecutorial function, it is perhaps enough removed from the constraints of the adversarial process to be a more rational and less reactionary consumer of social science. Perhaps that is why the police members of the Working Group were more receptive to the scientists' recommendations than were the prosecutors. Apart from pragmatic concerns about implementing social science's findings—which concerns are being addressed by advances, for example, in computerized means to present photographs sequentially—there remains little valid reason to resist at least two of the three key accuracy-promoting reforms supported by the research but not embraced by the Guide: double-blind testing and sequential presentation. Neither measure is all that difficult to implement. Both reduce the false-positive rate but not the true-positive rate, thus enhancing overall accuracy. And the novelty of those procedures—surely a weak reason to oppose them, given the stakes—will soon wear off as has been the case with every other modernization that law enforcement has, however reluctantly, ultimately embraced.

The third reform, videotaping (which even the police Working Group members opposed), at first glance seems more complex; but a moment's reflection ultimately points to the same conclusion. As mentioned, it does require some investment in equipment and personnel. And, more so perhaps than the other two points, it implicates litigation concerns because it will itself become part of an evidentiary record subject to adversarial exploitation. In response, several points might be made. First, false convictions also have costs, which the state either externalizes at the defendant's expense or eventually must at least partly internalize in the course of post-conviction proceedings, occasional damages awards, and perhaps another prosecu-
tion if the actual perpetrator is apprehended. Second, cost of course is not the only consideration; and society in any event is currently in a phase of investing huge resources in a variety of aspects of law enforcement, from an expanded patrol presence to a large prison infrastructure. It does not seem unreasonable on balance to invest a relatively small portion in ensuring greater evidentiary accuracy. Third, as some law enforcement agencies have found out, and the Rodney King episode notwithstanding, a video-taped record can often work to the agency’s and the prosecution’s advantage by documenting compliance with appropriate procedures and reducing the scope of disputed issues for trial. For this reason, and to protect officers from false allegations of misconduct, many departments have installed video recorders in patrol cars. Thus, once courts come fully to recognize—as they eventually will—the proper means to safeguard against investigator, instruction, foil, and presentation biases, a videotaped record of the procedures performed will serve to document law enforcement’s compliance and thus reinforce the credibility of the eyewitness identification.249

The final omission—the Guide’s failure to address the systemic problems associated with eyewitness interviewing—is perhaps easiest to understand. The kind of reforms in training, assignment, and institutional culture contemplated by Fisher would involve pervasive changes in the law enforcement community. If government officials resist relatively specific and contained revisions to particular procedures—such as the implementation of double-blind identification procedures, which involves little more than having someone from outside the investigation conduct the lineup—surely they would rebel at the thought of much more sweeping changes. Still, some police departments have begun to consider, and even to implement, some of the systemic reforms described by Fisher.250 And a general recommendation to move in that direction, the details of which could be guided by particular departmental needs, would not expose law enforcement or prosecutors to as much risk of exploitation by the defense bar as would more specific recommenda-

249. For an argument that a recommendation for a videotaping requirement should have been included in the Procedures, see Saul M. Kassin, Eyewitness Identification Procedures: The Fifth Rule, 22 LAW & HUM. BEHAV. 649 (1998).
250. Fisher, supra note 44, at 758.
tions concerning how to conduct interviews and lineups. But such a recommendation might, in the long run, have at least hortatory value in moving law enforcement toward creating an environment that is more conducive to effective interviewing.

V. CONCLUSION

Prompted by growing awareness of the risk and sources of erroneous convictions, the Department of Justice has undertaken an important effort to integrate the findings of social science research concerning eyewitness evidence into day-to-day law enforcement practice.

Despite its several shortcomings, the Guide certainly is a step in the right direction, offers a number of important recommendations, and has substantial symbolic value as an example of how the legal system can begin to take advantage of the wealth of valid social science research that has accumulated over the past several decades. The product of Justice’s project, Eyewitness Evidence: A Guide for Law Enforcement, contains much that is potentially useful in promoting greater accuracy in eyewitness evidence. As the Guide itself states, the next steps will be development of (1) training criteria for each of the recommended procedures, (2) a national validation strategy for field testing of each procedure, and (3) future refinement of its recommendations based on experience and continuing research. Thus, Justice’s current commitment to ongoing study suggests that the Guide is not its last word in this area and offers hope that the shortcomings noted in this article will eventually be addressed.